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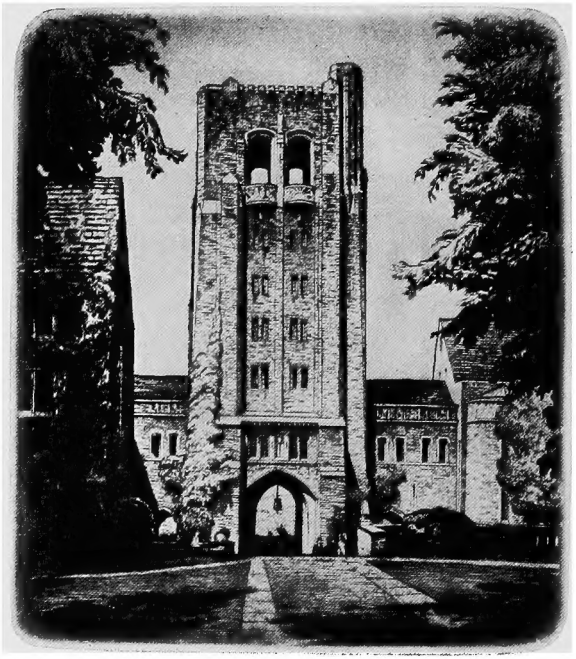
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A

TREATISE

ON THE LAW OF

FIRE AND LIFE INSURANCE.

WITH

AN APPENDIX,

CONTAINING FORMS, TABLES, &c.

BY

JOSEPH K. ANGELL.

BOSTON:

LITTLE, BROWN & COMPANY.

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PREFACE.

At no former period in the history of civilization has the Law of Insurance assumed the importance, or awakened the interest, which belongs to it at the present time, in nearly every part of the civilized world. Especially is this the fact in the United States: for here not only is the practice of Insurance, in all its varieties, already very general, but it is rapidly extending to all classes of society, and is receiving the countenance and sanction of government. The Author, therefore, deems no apology necessary for selecting Fire and Life Insurance as the subject of the following treatise, however much he may crave the indulgence of the reader for the manner in which he has discussed it.

The contract of insurance, as a *genus*, is peculiar, it being characterized by *risk* in one party, and premium, or price paid for *indemnity* against loss, in the other. These are the correlative conditions whose mutual operation constitutes the essence of the contract. In accordance with this fundamental idea, the author has commenced his work with a preliminary view of the nature and distinct aim of Insurance, in connection with an epitome of the history of its invention, adoption, and use; for it has ever been admitted that any one branch of knowledge is more rapidly and satisfactorily

comprehended by the aid of a precise understanding of the conjuncture which gave it an existence, and the benefits which afterwards assured its duration and extension. Moreover, it has, with entire truth, been asserted by an acute English writer,[1] that "no chapter in the history of national manners in later times would perhaps test and illustrate the growth and spread of civilization, as that containing a development of Fire and Life Insurances." It is, in some measure, under the same idea, that the author has been induced to prefix to the discourse on each of those *species* of Insurance an account of its rise and progress, and its present well ascertained utility.

The principles of law which govern Fire Insurance are so near akin to those which govern Life Insurance, that a well-known writer[2] has treated of them in connection, or at least not in separate chapters; whereas the author of the following work has adopted the plan of first treating of each in separate chapters, and then, in accordance with the plan of the writer just referred to, of considering them more in their relations with each other.

The author is well aware, that, in his earnestness to suffer nothing of importance to be overlooked and omitted, he has afforded instances of repetition; but the fault of redundancy is much more venial, especially in a practical law work, than the fault of omission, or even of too great condensation.

With this brief exposition of his aims, he submits his work to the public, in the hope that it may contribute, in some humble degree, to the better understanding of the important subject of which it treats; and in doing this he ventures to adopt the words of the venerable Bracton, one of the very earliest writers on English Law: "Si quid superfluum vel

---

[1] Dowdeswell on Life and Fire Insurance.

[2] Beaumont on Fire and Life Insurance.

perperam positum in hoc opere invenerit, illud corrigat et emendet, vel conniventibus oculis pertranseat, cum omnia habere in memoria, et in nullo peccare, divinum sit potiûs quam humanum." *Bracton*, lib. 1, fol. 1.

For the particulars of the copious matter which constitutes the Appendix, the attention of the reader is invited to the Table of the Contents of the Appendix, which immediately follows the Table of Contents of the Treatise. The forms, tables, &c., to be found in the Appendix, are mostly taken from Ellis on Fire and Life Insurance, and James on Life and Fire Insurance.

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PRELIMINARY VIEW

OF

THE CONTRACT OF INSURANCE.

EXPLANATION OF TERMS IN — UTILITY OF — NATURE AND FORM OF — ORIGIN AND HISTORY OF.

§ 1. When the performance of that, one of the objects of which depends on an uncertain event, the contract in relation to it, is said to be "hazardous."[1] A contract of this sort may be unlawful and void, as a *wager;* or it may be lawful and valid, as *providing security against future loss.* The principle of the latter, or, in other words, the principle of *indemnity*, is the general principle which runs through the whole contract of Insurance. A contract of indemnity is given to a *person*, against his sustaining loss or damage, and cannot properly be called one that insures the *thing*, it not being possible so to do; and, therefore, as Lord Hardwicke has said,[2] it must mean insuring the person from damage; that is, damage to the *thing* or to his property.

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[1] Men that hazard all,
Do it in the hope of fair advantages.
Merchant of Venice.

[2] Sadlers Co. *v.* Badcock, 2 Atk. R. 554.

§ 2. Insurance is used as the means not only of security against the dangers to which vessels and their cargoes are constantly exposed during their voyage and transportation; but as an expedient also against the danger of fire, to which commodities or houses are continually subject on the land; and against also the chance of sudden death, and the loss which the person insured against may sustain by the death of others, in whose existence he has a pecuniary interest; or that which his creditors or his family may sustain by his own.[1] It is, as Lord Mansfield has denominated it, "a contract upon speculation,"[2] and one which is generally called a contract of *indemnity* against loss or damage arising from an uncertain event.

§ 3. "Look," says Lord Hardwicke, "into the books which treat of insuring, and you will find the term is '*aversio periculi*,' the intention of all insurances being to cover any damages or loss the insured might sustain."[3] Thus, when a contract of this sort has relation to navigation and water transportation, or, in other words, when it is what is understood by the contract of *marine* insurance, (upon the law respecting which, that respecting the contracts of fire and of life insurance is grafted,) it is an obligation whereby one party, for a stipulated sum of money to be paid, undertakes to indemnify the other against certain perils or sea risks to

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1 See 1 Bell, Comm. 509.

2 Carter *v.* Boehm, 3 Burr. R. 1905.

3 Sadlers Company *v.* Badcock, *ubi sup.*; Emerigon on Ins. ch. 1. This work on maritime insurance is considered to be the most didactic, learned, and finished production upon that subject. 3 Kent, Comm. 348.

which his ship, freight, or cargo, or some of them, may be exposed during a certain voyage, or fixed period of time.[1] A more general definition is, a contract by which one of the parties binds himself to the other, to pay him a sum of money, or otherwise *indemnify* him, in the case of the happening of a fortuitous event provided for in a general or special manner in the contract, in consideration of the sum of money which the latter pays, or binds himself to pay him.[2] It is a contract to protect men against uncertain events which *in any wise* may be a disadvantage to them.[3]

§ 4. The form in which a contract of this peculiar nature, is effected, is called a POLICY, from the Italian, *polizza di assecurazione*, or *di securta*, which signifies a memorandum in writing, or note or bill of security. Although an instrument in its form extremely ancient, and in its language very ungrammatical, it has acquired a fixed meaning by the usage of trade.[4] Lord Kenyon, C. J., has said, that he remembered many years ago, that if Lombard Street had not given a construction to the contract of insurance, a declaration on a policy would have been bad on a general demurrer; but that the uniform practice of merchants and underwriters had rendered them intelligible.[5] The fact that insurance was introduced into England by the Lombards, (a colony of whom was settled in London in the thirteenth cen-

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[1] See the most approved works on Marine Insurance, such as Park, Marshall, Hughes, Phillips, Duer, &c.; and 3 Kent, Comm. Lect. xlviii.

[2] Pardess. part 3, t. 8, 588.

[3] Per Lawrence, J., in Lucena *v.* Crawford, 3 B. & Pull. R. 301.

[4] Smith, Mer. Law, 202.

[5] Brough *v.* Wetmore, 4 T. R. 208.

tury,) is universally allowed, and one evidence is a clause said to be retained in the English policies of the present day, which is, "It is agreed by us, the insurers, that this policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street."[1] As all the positive stipulations of the policy that may be enforced by law, are on the part of the insurer, it is not necessary that it should be signed by both parties; and this mode of executing the instrument, though sanctioned by usage, is derived from the peculiar nature of the contract. The obligations implied on the part of the person obtaining the insurance, are merely conditions, on the performance of which his right to indemnity depends.[2]

§ 5. In marine insurance, there are what are called "open" and what are called "valued" policies of insurance — a distinction that relates to obtaining the insurance in the event of a loss. The former is one in which the amount of interest is not fixed by the policy, but is left to be ascertained in case a loss should happen. The latter is one in which a value has been set upon the property or interest insured and inserted in the policy; the value thus agreed upon being in nature of liquidated damages, and so saves any further proof of damages.[3]

§ 6. The consideration for this obligation to secure or indemnify (the policy) is called the PREMIUM, a word signifying price, and is from the word *primo*, because

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[1] See Duer on Ins. sect. 11, p. 33.

[2] Ibid. p. 65, § 8.

[3] Park on Ins. 1; 3 Kent, Comm. 272; Irving v. Manning, 8 B. & Cress. R. 561.

formerly it was paid in advance or at the time of signing the policy. It has been called by French writers[1] *primeur premie*, or *agio d'assurance*.[2]

§ 7. The party who takes upon himself the risk is called the INSURER, and sometimes the UNDERWRITER, from the party's subscribing his name at the foot of the policy; the party protected by the insurance is called the INSURED, or ASSURED. The premium paid by the latter, and the peril assumed by the former, are two correlatives,[3] insepa-

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[1] Emerigon, ch. iii. s. 1; Poth. no. 81; Cleirac, p. 343.

[2] The insurance ought to be so made as that the assured, upon the balance of the account, may obtain his *clear* capital; for he will thus recover his whole right, and will have no temptation to fraud. Thus, suppose A. has a cargo coming from the West Indies, which, if it arrive safe, will be worth £100 in England, and that the premium for insurance upon the ship is ten per cent. It is then plain that A's *clear* capital is £90; and that A. has acted justly in insuring his *whole* capital, that is, the *clear* capital and the *premium* together or the whole £100; for if the voyage succeeds, A. receives £100 from the cargo, and has paid £10 for the premium, which leaves A. his *clear* capital of £90. If the voyage fails, A. receives £100 from the insurer, and has paid £10 for the premium. So that, in either case, of the success or failure of the voyage, by insuring his *whole* capital, A. exactly recovers his *clear* capital, and has no advantage from the loss of the vessel. Morris's Essay on Ins. 22.

[3] In practice, however, the premium is not always paid, (as is shown by Mr. Bouvier, in his valuable Law Dict., tit. Premium,) when the policy is underwritten; for insurances are frequently effected by brokers, and open accounts are kept between them and the underwriters, in which they make themselves debtors for all premiums; and sometimes notes or bills are given for the amount of the premium. The French writers, when they speak of the consideration given for maritime loans, employ a variety of words in order to distinguish it according to the nature of the case. Thus, they call it *interest* when it is stipulated to be paid by the month or at other stated periods. It is a *premium* when a gross sum is to be paid at the end of the voyage, and here the risk is the principal object they have in view. When the sum is a percentage on the money lent, they denominate it exchange, considering it in the light of money lent in one place to be returned in

rable from each other; and the union constitutes the essence of the contract.[1]

§ 8. The property itself insured is called the SUBJECT OF THE INSURANCE. The title or interest which the assured has, is called his INSURABLE INTEREST.

§ 9. The business of insurance, under the contract as thus set forth, is founded upon the principles thus briefly stated: Suppose, it has been remarked,[2] that of *forty* ships, of the ordinary degree of seaworthiness, employed in a given trade, *one* is annually cast away, the probability of loss, it is obvious, will be equal to *one fortieth.* And if an individual wishes to insure a ship, or a cargo on board a ship, engaged in this trade, he ought to pay a premium equal to the *one fortieth* part of the sum he insures, exclusive of such an additional sum as may be required to indemnify the insurer for his trouble, and to leave him a fair profit. If the premium exceed this sum, the insurer is overpaid; if it fall below, he is underpaid.

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another, with a difference in amount between the sum borrowed and that which is paid, arising from the difference of time and place. When they intend to combine these various shades, into one general denomination, they make use of the term *maritime profit*, to convey their meaning. See Park on Ins.; 15 East, 309, Day's note, and cases there cited; Jennings *v.* Chenango County Mutual Ins. Co. 2 Denio, (N. Y.) R. 75.

[1] Mr. Babbage uses "assure" and "insure" as having distinct meanings. (See his work on *Assurance for Lives.*) It appears, however, says Mr. Beaumont, that the two words only differ as "enfeeble" and "affaiblir," which have both the same meanings; the one having the Saxon prefix, and the other the French or Latin. See "sweeten" and "adoucir," "shorten" and "accourcir," "enfranchise" and "affranchir." *Pref. to Beaum. on Ins.*

[2] M'Culloch, Com. Dict.

§ 10. The utility of this species of contract, is obvious, and it has been noticed in this light by distinguished writers upon political economy.[1] Indeed, a long experience has demonstrated, that the contract of marine insurance has tended greatly to the advancement of trade and navigation, because the risk of transporting and exporting being diminished, persons are more easily induced to engage in an extensive trade, and to embark in useful, and at the same time, hazardous enterprises. A failure in the object which the party has in view in providing beforehand for an indemnity, is not attended with the ruinous consequences that would ensue were not the contract of insurance a legal one. Without insurance, says Marshall,[2] commerce could only be carried on by the few, who are wealthy enough or bold enough, to run alone the risks which necessarily attend the prosecution of it; and the utility of marine insurance, says that author, cannot be better expressed than in the words of the preamble to the Stat. 43 Eliz. c. 12, which recites that, "By means of policies of insurance, it cometh to pass, upon the loss or perishing of any ship, there followeth not the undoing of any man; but the loss lighteth rather easily upon many, than heavily upon few, and rather upon them that adventure not, than those who do adventure; whereby all merchants, especially of the younger sort, are allured to venture more willingly and more freely."[3] It is insur-

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[1] 2 Smith, Wealth of Nations, 148; and see Introd. to Park *on* Ins. ii.

[2] 1 Marsh. on Ins. 3.

[3] "It is needless," says a learned Scotch writer, "to insist on the benefits of a contract by which the insurer divides the loss with others, and, on the large average of his dealings, contrives to earn large gains; while the assured is secure against the ruin which would crush an individual. But

ance, says Duer, "that supplies courage to the timid and capital to the needy, and in the competition that ensues every source of legitimate gain is certain to be explored, every outlet of profitable adventure to be discovered and followed." [1]

§ 11. Although *bills of exchange* have ever been assignable, according to the custom of merchants, (contrary to the rule of the Common Law, that *choses in action* are not so,) and although, by the custom of *marine* insurance, policies are transferable freely with bills of lading,[2] yet policies of *fire* insurance have never been so regarded, and the interest in them cannot be transferred from one to another without the consent of the office.[3] It appears, that the mercantile world in England, have not been entirely satisfied with decisions against the transferability

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the obvious necessity of some such refuge from individual disaster, amidst the perils of such a trade as ours; and the impracticability of proceeding without this expedient, now that it is known, afford unquestionable proofs of the narrow limits of ancient commerce, in which insurance was not practised." Bell, Comm. 509. As to the importance of Fire Insurance, see *post*, Chap. I.

[1] Duer on Ins.

[2] The right to assign or give the benefit of a *marine* policy when the property has been transferred also, does not appear, says Ellis, p. 76, ever to have been disputed. See Delany *v.* Stoddart, 1 T. R. 22; Hibbert *v.* Carter, 1 T. R. 475. Where the consignee of goods pledges the bill of lading as security for advances made by him and upon an agreement that the consignee shall effect a policy of marine insurance on the goods for the benefit of the pledgee, and deposit the policy with him, the pledgee may sue on the policy in his own name. Sutherland *v.* Pratt, 12 M. & Welsb. 16; and see Pacific Ins. Co. *v.* Cutler, 4 Wend. (N. Y.) R. 76; Wheeling Ins. Co. *v.* Morrison, 11 Leigh, (Va.) R. 354.

[3] Park on Ins. 449; Etna Fire Ins. Co. 10 Wend. (N. Y.) R. 385; Murdock *v.* Chenango Mutual Fire Ins. Co. 2 Comst. (N. Y.) R. 219; 3 Hill, (N. Y.) 88.

of fire insurance policies; but nevertheless the decisions must be regarded as sound in principle, and custom alone can give new properties to them, separating them from bonds, trusts, covenants, and other choses in action.[1]

§ 12. And though policies of insurance are not to be ranked with *specialty contracts*, not being generally under seal, yet they have always been held as sacred agreements, and of the first credit: so much so, that when they are once underwritten they can never be altered by any authority whatever; because it would open a door to an infinite variety of frauds, and introduce uncertainty into a species of contract, of which *certainty* and *precision* are the most essential requisites.[2] At the same time, it is to be observed, says Park, that cases frequently may and do exist, in which a policy, upon proper evidence, may be altered without any violation of the foregoing rule, and which has been often done by courts of Law and Equity. It should be remembered, continues this writer, that, in questions of insurance, which is a contract founded upon broad, equitable principles, Courts of Common Law are bound by the same rules of decision as Courts of Equity. After signing, policies are frequently altered by *consent* of the parties, and such policies are good, agreeably to the maxim, *consensus tollit errorem*.[3]

§ 13. It is laid down by Duer, in treating of the law of Marine Insurance, that it is immaterial whether the written words of a policy are inserted in the body of the

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[1] Ellis on Fire and Life Ins. 152; Beaumont on Fire and Life Ins. 64.

[2] Park on Ins. 2, 3.

[3] See Ellis, 88; Beaum. 91.

instrument, or written on its face or in the margin; and he shows, by the authorities, that if they were in fact written, before the execution of the policy, or by mutual consent after the execution, they are essential parts of the contract. But whether the decisions on this subject in England and in this country, have not sanctioned a dangerous laxity, is a question that merits the serious consideration of insurers. In contrast with this authorized laxity, he refers to the law of France, by which not only all that is written must be in the body of the policy, but if any blank is left by which other words may be written by the assured, the contract is void.[1] With us, not only are spaces left in the policy, but to increase the temptation they may suggest, the face and margin are offered to the ingenuity of fraud as an open field for the display of its powers. Mr. Duer is not prepared to affirm, with Mr. Phillips, that a memorandum on the back of the policy not referred to in the body of the instrument, nor signed by the insurer, would be considered a part of the agreement or be permitted in any manner to vary or modify its terms. There has been no decision to that effect in the United States.[2]

§ 14. It is material to observe, though policies of insurance are called *written* instruments, they are, for the convenience of trade and the despatch of business, generally *printed*, leaving blanks for the insertion of names and all other requisites. This being the case, it is frequently

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[1] He cites the Code de Commerce, (Art. 332,) and other French authorities.

[2] 1 Duer on Ins. 77, 78.

necessary to insert written clauses, in order to express the meaning of the parties to the contract, which, from some particular circumstances, the printed form may not sufficiently explain. These written clauses and conditions, thus inserted, are to be considered as the real contract; and the court will look to them to find out the intention of the parties, and will consequently suffer such conditions to control the printed words in policies of insurance.[1]

§ 15. Whether a policy be printed or written, says Kent, J.,[2] the construction of it must be the same, as in both cases the contract is of equal *validity*. But the words in writing, if there be a doubt of the meaning of the whole, have greater effect attributed to them than those in print; because they are the immediate terms selected by the parties, whereas the others are a general formula.[3] "The only difference," says Lord Ellenborough, "between policies of insurance and other instruments in this respect, (meaning the construction of) is that the greater part of the printed language of them, being invariably uniform, has acquired from use and practice a known and definite meaning, and that the words superadded in writing, (subject indeed always to be governed, in point of construction, by the language and terms with which they are accompanied,) are entitled nevertheless, if there be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed

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[1] Park on Ins. 4. The use of printed forms is now universal. See 1 Duer on Ins. 64.

[2] Per Kent, J., in New York Ins. *v.* Thomas, 1 Johns. (N. Y.) Cases, 1.

[3] See Colt *v.* Commercial Ins. Co. 7 Johns. (N. Y.) R. 390.

to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general form adapted equally to their case, and that of all other contracting parties upon similar occasions and subjects."[1]

§ 16. The risks against which insurances may be made are infinite; and formerly, in England, great frauds were practised upon ignorant and unwary persons under color of insurances of different sorts, which the legislature found it necessary from time to time to repress. In the reign of Anne it appears that several persons opened offices for making insurance on *marriages, births, christenings*, &c., whose fraudulent practices were found to be so injurious to the public, that by the stat. 9 Anne, c. 6, § 57, a penalty of £500 is imposed on every person setting up such office, and £100 on every person making such insurances, in any office already set up.[2]

§ 17. Policies of insurance have sometimes been put upon the footing of *wagers*, and they much resemble a species of wager not uncommon in the mercantile world, namely, a periodical payment to be made by one party until a certain event happens, upon the condition of receiving a sum of money from the other party upon the happening of the event. An *indemnity* is a *security* against *future* loss or damage, whilst a *debt* is *a sum of money due and owing*. Any payment under an indemnity is *contin-*

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[1] Robertson *v.* French, 4 East, R. 124.

[2] See Park, 2.

gent, both as to time and *circumstances;* upon a debt it is *certain and immediate.* According to natural reason, no man would accept as security from A., or give valuable consideration to A. for an assignment of a debt actually due and owing to him from B., unless notice be forthwith given to B., because, if notice be not given, A. may still recover the debt as soon as he pleases; but the case is very different upon a policy; until the event happens upon which payment is to be made, no debt has accrued, and therefore the debtor could not have been called upon to pay the wrong person.[1]

§ 18. A mere hope or expectation, without *some interest* in the subject-matter, is a *wager* policy, and all such policies, by statute, in England, are declared to be void. 19 Geo. 2, c. 37. Lord Mansfield, in Kent *v.* Bird,[2] says, a policy of insurance is, in the nature of it, a contract of indemnity, and of great benefit to trade; but the use of it was perverted by its being turned into a wager; and it was to remedy this evil, that the statute 19 Geo. 2, c. 37, was made; which, after enumerating in the preamble the various frauds and pernicious practices introduced by the perversion of this species of contract, and amongst others, that of gaming or wagering under pretence of insuring vessels, &c.; proceeds, under general words, to prohibit *all* contracts of insurance by way of *gaming* or *wagering.*

§ 19. It was admitted by the judges of the Court of

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[1] Ellis, 153.

[2] Kent *v.* Bird, Cowp. R. 583.

King's Bench, in Crauford *v.* Hunter,[1] that at common law, prior to the statute just referred to, wager policies were not illegal.

§ 20. But the law, says Chancellor Kent, has been thought to descend from its dignity, when it lends its aid to recover the fruits of an idle and frivolous wager upon any subject.[2] The two contracts, the wager and the indemnity, resemble each other in their extrinsic form, but differ radically in their tendency, as well as in their objects. The first, says Duer, "as a legitimate and highly beneficial contract, has eminent claims on the protection of the law; the second deserves no other character than that of gaming on an extensive scale; nor is there any species of gaming more detrimental to the morals of the parties, or more hazardous to the interest of the State in which it is allowed."[3] In New York, the courts had formerly assumed it to be a settled principle of the courts of common law, that a policy in which the assured had no interest, and which was, in fact, nothing more than a wager or bet, whether such a voyage would be performed, or such a ship arrive safe, was a valid contract;[4] and it was only required that the wager should concern an innocent transaction, and not be contrary to good morals or sound policy.[5] But now,

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1 Crauford *v.* Hunter, 8 T. R. 13.

2 See 3 Kent, Comm. 276, 277. And see Fuller *v.* Glover, 12 East, R. 123.

3 1 Duer, Ins. 92.

4 Jubel *v.* Church, 2 Johns. Ca. 333; and see 3 Ibid. 39; Buchanan *v.* Ocean Ins. Co. 6 Cow. (N. Y.) R. 318.

5 Bunn *v.* Riker, 4 Johns. (N. Y.) 426, and cases cited in 3 Kent, Comm. 277, 278.

by statute,[1] all wagers, bets, or stakes made to depend upon any lot, chance, casualty, or unknown or contingent event whatever, are declared to be unlawful, with the exception of contracts upon bottomry or respondentia, and all insurances made in good faith for the security or indemnity of the party insured; so that the statute has effectually destroyed *wager policies*, they not being within the exception.[2] The Supreme Court of Massachusetts has expressed a strong opinion against the validity of wager policies: thus, Parker, C. J., in giving judgment in Amory *v.* Gilman,[3] says: "Whether a mere wager policy, without interest, can be supported here conformably to the general character of our laws, and to the principles of our government, I apprehend we need not now determine; though, considering the great reluctance with which that doctrine was established as the common law by the courts of England, and the immediate interference of Parliament to nullify such policies upon the doctrines being so established; we may well be justified in doubts whether, in this country, where the subject is in a great measure, *res integra*, such contracts could be supported, more especially when the temper of our legislature respecting every species of gaming can be so well understood by a recurrence to various statutes upon that subject." It would seem, that a gaming or wager policy would not be held good in Pennsylvania; for Huston, J., in delivering the judgment of the court in Adams *v.* Pennsylvania Insurance Company,[4] says: "Contracts are predicated

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[1] New York Rev. Sts. vol. i. 662; 3 Kent, Comm. 277.

[2] 3 Kent, Comm. 277.

[3] Amory *v.* Gilman, 2 Mass. R. 1.

[4] Adams *v.* Pennsylvania Ins. Co. 1 Rawle, (Penn.) R. 108.

on the law as established, that there must be something in which the assured *has an interest*, or the contract is void." In Louisiana, where the provisions of the Code de Commerce have been substantially adopted, a policy not sustained by an actual interest, would doubtless be adjudged invalid; and should there be a question in the courts of any other State than those already mentioned, the opinion has been confidently expressed, by a very learned and able writer,[1] that the decision of it would be controlled by the just morality and sound policy that have governed the courts of Massachusetts and Pennsylvania.

§ 21. The absence of interest on a marine policy, does not appear to have been made the ground of a successful defence to an action at law, in England, before the legislation on the subject in the reign of George II.[2] In reference to that legislation, Chief Justice Best has observed, "We cannot too strongly enforce all the provisions of this statute. If we held, that unless the words recited in the statute are introduced into policies, they are not gaming policies, and they are valid, we shall render inoperative its provisions against fraudulent insurances and such as encourage clandestine trade. The act does not say that policies containing certain specified words shall be void, but that 'no insurance shall be made, interest or no interest, or without further interest than the policy.' The meaning of this clause is, that no insurance shall be effected by a policy so worded, as to entitle the assured to recover against the underwriters a certain

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[1] 1 Duer on Ins. 95.

[2] Ante, § 19; 2 Am. Lead. Ca. 450.

stipulated sum of money, whether he had any interest in the ship or cargo or not, or that binds the underwriter not to require any other proof of the assured's interest but the admission of such interest in the policy. Whatever words may be used, if that be the effect of the policy, no action can be maintained on it." [1]

§ 22. In a case where it appeared, that the engagement was, in consideration of forty guineas, to pay £100, in case Brazilian shares should be done, at a certain sum, on a certain day, subscribed by several persons, each for himself,[2] it was contended that the plaintiff was entitled to recover his whole demand, inasmuch as the contract on which he sued constituted in effect a wager on an innocent topic, and was not a policy of insurance prohibited by 14 Geo. 3, c. 48, but the court held the contrary, Tindal, C. J., observing: "Here is a premium paid, in consideration of the insurers incurring the risk of paying a larger sum upon a given contingency. The instrument is open to all who may choose to subscribe, that is, without restriction of persons or numbers. It then proceeds, in the usual language of policies of insurance, 'We respectively will pay or cause to be payed to ———— the sum and sums of money which we hereunto have respectively subscribed, without any abatement whatever, in case,' &c. The learned judge then said, that if the instrument in Roebuck *v.* Hamerton,[3]

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[1] Murphy *v.* Abel, 4 Bing. R. 567.

[2] Paterson *v.* Powell, 9 Bing. R. 320.

[3] Roebuck *v.* Hamerton, 2 East, R. 391. The contract in this case, was a policy upon the sex of the Chevalier D'Eon, and it was holden to be a policy within the statute of 14 Geo. 3; and in Mollison *v.* Staples, Park on

was rightly held to be a policy, he could make no just discrimination between that instrument and the one in question before him. It was true, he said, that the policy contained no clause about average, but that was because the circumstances of the case did not require it. "Here," said Bosanquet, J., "we have a premium; an indefinite number of subscribers contemplated, who engage, not each for the other, but separately on a given event, to pay a larger sum than the premium; while the separate dates for each receipt of premium, lead to the inference that all the signatures were not obtained at the same time. These are so much the leading features of a policy of insurance, that we cannot doubt that this contract falls within the meaning of the statute which enacts, that such an instrument shall be void, if the parties insuring *have no interest* in the event insured against."

§ 23. We have given the above general review of the law condemnatory of wager policies, because it has relation to policies of *fire* insurance made by an assured *who has no interest*, which are to be independently and more elaborately considered in one of the following chapters. It may be further added, that in Scotland, no wager

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Ins. 640, n., where a policy was made on the event of there being an open trade between Great Britain and the province of Maryland, on or before the 6th day of July, 1778; Lord Mansfield said, "It was clear the plaintiff could not recover." In both cases the decision turned not upon the statutes applying to insurances where the subject-matter of the insurance is legitimate, but to events in which the parties insuring *have no interest*. Per Tindal, C. J., in Paterson *v.* Powell, *ubi sup.* But that an action will lie for the recovery of a sum of money depending on an innocent wager, coming within the definition of a wager, and not within the definition of a policy of insurance, see Cousins *v.* Nantes, 3 Taunt. R. 513.

or gaming contract will support an action;[1] and that wager policies, or policies without any real interest to support them, are condemned by positive ordinances in France and in other parts of the continent of Europe.[2]

§ 24. *Reinsurance*, as understood by the law of England, may be said to be a contract which the first insurer enters into, in order to relieve himself from those risks which he has incautiously undertaken, by throwing them upon other underwriters, who are called reinsurers.[3] If the insurer gives a less premium for the reinsurance, all his gain is the difference between what he receives as a premium for the original insurance and what he gives for an indemnity against his own policy; if he gives as much for reinsurance, he gains nothing by the transaction; and, if he gives a higher premium, as insurers will sometimes do to cover a dangerous risk, he of course becomes a loser by his original insurance.[4] Reinsurance may be adverted to as an illustration of the distinction, (which there will be occasion in a following chapter to notice,) between an insurable interest, and a property in the subject to which the insurance relates.[5]

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1 Bell, Comm. 300.

2 2 Magens, 65, 68, 88, 132, 229, 257. The authorities cited by Chancellor Kent, in 3 Kent, Comm. 278, namely: Ord. de la Mar. liv. 3, tit. 6; Dess. Ass. art. 22; 1 Emerigon, 264; Ord. of Genoa, of Middleburg, of Rotterdam, of Amsterdam, of Hamburg, and Stockholm. Decisions Ratæ Genoæ, 55, n. 9.

3 Park on Ins. 276. The meaning of reinsurance is an indemnity against a risk insured by the assured in consequence of a prior insurance upon the same property or some part of it. Mutual Safety Ins. Co. *v.* Hone, 2 Comst. (N. Y.) R. 235.

4 3 Kent, Comm. 278.

5 1 Phillips on Ins. 146, 203. See *post*, Ch. IV.

§ 25. The practice of reinsurance seems to have been taken in England from many of the commercial States on the continent of Europe; and many of the continental writers upon insurance have written upon it and in favor of it. Among the most celebrated may be mentioned Le Guidon,[1] Roccus,[2] Emerigon,[3] and Pothier.[4] The Ordinances of Louis XIV. adopted and followed the idea that prevailed in France when the Treatise of Le Guidon was written; and by an article in that celebrated code of laws,[5] it is expressly declared, that "it should be lawful to the assurers to make reinsurance with other men of those effects which they had themselves previously insured." But the practice in England, when it was unfettered and unrestrained, soon became pernicious to a large commercial nation, and instead of conferring the great benefits which were expected, as written by those foreign writers, were at length, with their companions, the "wager policies," which were quite as mischievous, included in the act of 19 Geo. 2, c. 37, which most effectually put a stop to the practice of "wager policies," and also seems, by the restrictions in the fourth clause of the act, very nearly as well to have put an end to the practice, in England, of reinsuring.[6] But this statute never extended to the British Colonies, and has never been adopted by such as became independent States;[7] and reinsurance, in the United States, is

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1 De Assecur. note 12.

2 Tit. Assur. No. 96.

3 C. 2, Art. 19.

4 1 Art. 247.

5 Ord. of Louis XIV., tit. Assur. Art. 20.

6 Hildyard on Marine Ins. 774. See Andree *v.* Fletcher, T. R. 161.

7 Merry *v.* Prince, 2 Mass. R. 176. The Colonies were not bound by any acts of Parliament unless particularly named. 1 Bla. Comm. 108.

frequent.[1] The second insurer does not become strictly a surety for the first insurer; the reinsurance is a totally different contract.

§ 26. A *double insurance* is where the insured makes two insurances on the same risk and the same interest. It differs from reinsurance in this, that it is made by the assured, with a view of receiving a double satisfaction in case of loss; whereas reinsurance is made by a former insurer, his executors, or assigns, to protect himself and his estate from a risk to which they were liable by the first insurance. But a double insurance, though it be made with a double satisfaction in case of loss, and is therefore in the nature of a wager, is not void; the two policies being considered as making but *one insurance*. They are good to the extent of the value of the effects put in risk; but the assured shall not be permitted to recover a double satisfaction. He may sue the underwriters on both the policies, but can only recover the real amount of his loss. In general, persons insuring are to give notice of any other insurance made elsewhere upon the same property, in which case the insurers are only to be liable to the payment of a *ratable proportion* of any loss or damage; even without a special condition of the policy, a party insured can only recover the real amount of his loss, and if he sues one insurer for the whole, that insurer may compel the others to contribute their proportional parts.[2] The doctrine of contribution,

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[1] 1 Phillips on Ins. 147. And see New York Bowery Ins. Co. *v.* New York Fire Ins. Co. 17 Wend. (N. Y.) R. 350.

[2] Park on Ins. 280; 1 Marsh. on Ins. 146; 3 Kent, Comm. 280; Ellis on Fire and Life Ins. 13, 14; Beaumont on Fire and Life Insurance, 56, 90.

says Kent,[1] applies very equitably to such a case. It was so declared in Thurston *v.* Koch;[2] and though in most countries of Europe the first policy in the order of time is to be exhausted before the second operates, yet the rule requiring the insurers in each policy to bear a ratable share of the loss was declared, in that case, to be founded in equity and in sound principles of commercial policy. The French rule is, that if there be several contracts of insurance on the same interest and risk, and the first policy covers the whole value of the subject, it bears the whole loss, and the subsequent insurers are discharged on returning all but half per cent. premium. But if it does not cover the entire value, the subsequent policies, in case of loss, are bound only to make up the part uncovered.[3] The ancient rule in England was according to the French ordinance,[4] and it has been deemed more simple and convenient; and Kent[5] considers it more consonant to a strict construction of the contract with the first underwriter. Sometimes policies have a clause introduced into them to prevent the rule of contribution, and to make the insurers responsible according to the order of date of their respective policies.[6]

§ 27. It is a fundamental rule, that in all questions respecting the two subjects of this work — fire and life

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1 3 Kent, Comm. 280.

2 Thurston *v.* Koch, 4 Dallas, R. 348. And see Carpenter *v.* Providence Washington Ins. Co. 4 How. (U. S.) R. 188.

3 3 Kent, Comm. 281, citing Code de Commerce, art. 359; 1 Marsh. on Ins. citing Le Guidon, ch. 2, art. 16 and 18, ch. 3, art. 3.

4 Malynes, 112; 1 Show. R. 132.

5 3 Kent, Comm. 281.

6 Ibid. and American cases there cited.

insurance — we must be governed by the analogous decisions of the courts and general law relating to maritime insurance.[1] Hence, we have been prompted to refer, in the preceding pages, in illustration of the peculiar nature of the contract of insurance, to many cases which have arisen under policies of the last-mentioned sort of insurance. For the same reason, we are induced next to offer a sketch of the *origin and history* of maritime insurance, the prototype, as just suggested, of fire and life insurance.

§ 28. Much pains and industry have been employed in endeavors to discover the origin of maritime insurance; the result of which has shown it to be so much involved in obscurity, that no satisfactory solution can be here afforded; though there is one thing which may be considered clear, that wherever foreign commerce was introduced, insurance must have soon followed as a necessary attendant, it being impossible to carry on a very extensive trade without it, especially in time of war.[2] Beaumont, in a note to his "Treatise on the Law of Fire and Life Insurance," has the following: "Some writers have shown either a zeal to fix the stamp of antiquity to the contract of insurance, or to give such ancient nations as were celebrated for commercial eminence, the further credit of this useful invention. That the Rhodians, who were supreme in commerce a thousand years before the Christian era, were its inventors, is the opinion of some; no traces, however, of the fact appear in any fragments

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[1] See Dowd. on Life and Fire Ins. 13.

[2] Park on Ins. Introd. iii.; 1 Marsh. on Ins. 3.

of their laws incorporated in the Roman codes; but being without the complete body of the Rhodian law, the present age cannot give a negative to the opinion. Some passages are quoted from Livy, which Emerigon thinks show the existence of this kind of contract amongst the Romans; but, as it has been observed, there is no mention of any premium being paid for the indemnity named in these passages, which resolve themselves into a statement that a risk of transport, for the use of the Roman government, was by that government taken by themselves, as liberal statesmen, in the cases given, were bound to do. Suetonius, in the Life of Tiberius Claudius, mentions that the Emperor offered *certa lucra* to the corn-merchants, and took the risk upon himself of transport of the cargoes. These bounties and indemnities were intended as inducements to secure a supply of a necessary commodity in the time of scarcity. A passage from Cicero's Letters[1] is more applicable to a bill of exchange than to insurance, the occasion spoken of being the payment of a sum of money by some expedient, which would avoid the risk of transport of the cash. A passage in Ulpian,[2] may have a like solution. Grotius and Bynkershoek are opposed to the notion of insurance being known to the Romans."

§ 29. Mr. Meredith, in his translation of Emerigon on Insurances, and in a note to that author's preface, says: "It may be said, for reasons that want space to be rehearsed, that it is extremely *probable* that insurance

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[1] Lib. ii. 17.

[2] Dig. i. 1 tit. 45.

was well known to, and commonly used by, the Romans." Mr. Duer, in his very able and elaborate work on marine insurance,[1] has given and very plausibly, at least, maintained an affirmative to the opinion, that insurance is an invention of the classic origin which has been claimed for it. His view is, (objecting to the assertion of Park, repeated by Marshall, that in consequence of the limited commerce of the ancients, the contract of insurance had never been suggested to them,) that taking into consideration the extent of the remains that have reached us from antiquity, the entire absence of direct and positive proof, is an objection not easily surmounted; but the silence of the Roman Law on the subject is an *argument* of great weight in favor of the general opinion which has long been entertained, that the contract of insurance was not known to the ancients. "Yet," says this very learned author, "we call to mind how very extensive and flourishing was the commerce of many of the ancient cities and states, — to select a few, of Tyre, Carthage, Corinth, Athens, Rhodes, Alexandria, — it seems highly improbable that a contract of such easy invention as marine insurance, and of such utility, that it seems almost necessary to the existence of an extended commerce, was wholly unknown; and this improbability is strengthened by the fact that, in modern times, the introduction of insurance was almost coeval with the revival of commerce, and this, in an age when the cloud of ignorance, the darkness visible, that had so long brooded over

[1] The Law and Practice of Marine Insurance, deduced from a critical examination of the adjudged cases, the nature and analogies of the subject, and the general usage of commercial nations: By John Duer, LL. D., New York, 1845.

Europe, had scarcely begun to be dispelled, and the beams of knowledge and civilization were yet struggling in the mists of a doubtful twilight." Again says he, "For myself I am fully persuaded, that were we wholly ignorant of the laws of the Romans, but knew from history the extent of their commerce, we should deem it far more probable, that marine insurance was in frequent and general use than loans on bottomry and respondentia; for these plain reasons, that the contract of insurance is simpler in its provisions, less onerous in its terms, more easy to be effected, and of far wider utility." The prevalence of *bottomry* itself among the Romans, Mr. Duer considers, is alone sufficient to disprove the long entertained (and singular, as he pronounces,) notion, that ancient navigation was exempt from hazard; and he contends, that but for hazards of navigation, this contract could not have existed. He contends, upon the authority of Livy and Seutonius, that the government, in cases of transportation of cargoes by merchants, was the insurer, in the strict and proper sense of the term, as it became the guaranty against the apprehended perils. "The objection, that no premium was paid, is hypercritical, and is easily answered. The government received a premium in the benefit resulting to the public, and the merchants paid a premium in a reduction from the price they would otherwise have received. Had the risks of the voyage been cast upon the merchants, the value of the risks, as computed by them, would doubtless have been added to the price they demanded." Merchants, Mr. Duer maintains, were the sole inventors of marine insurance, and in reference thereto he says — "The *custom of mer-*

chants supplied the rules by which it was governed; and for a long period, all its controversies were exclusively decided, either by the *arbitration of merchants, or by tribunals specially established for their use.* It was not a subject of positive law, nor within the jurisdiction of the ordinary courts of justice. It is highly probable that a similar state of things existed under the empire; and if so, the omission of insurance in a compilation of its general laws, is readily explained. The contract and the law of insurance were unknown to the tribunals and magistrates by whom the general laws of the empire were administered, and must have been equally unknown to the jurisconsults at Rome, from whose writings the laws of Justinian were principally extracted."

§ 30. The very earliest collection of maritime laws promulgated among the Italian States, upon the revival of commerce after the dismemberment of the Roman Empire, are silent upon the subject of insurance, though it is evident that in those days almost all the commerce of Europe centered among the Italian people. The Tabula Amalfitana, or Amalfitan Table, which was published at the conclusion of the eleventh century, was the earliest of these collections, but in it is discoverable no reference to insurances; neither is any mention found of them in the celebrated code supposed by some to have been compiled and agreed upon at an assembly of many commercial cities, such as Marseilles, Pisa, Genoa, and Barcelona, and published under the title of "*Il Consolato del Mare*," at the close of the thirteenth or the commencement of the fourteenth century.[1] The first allu-

[1] Dowd. on Fire and Life Ins. 6. And the historical view of maritime law in the Introd. to Park on Ins.

sion to insurances anywhere to be found is contained in the sixty-sixth of "The Laws of the Merchants and Masters of the magnificent city of Wisbuy," a port in the Baltic which had attained considerable distinction and prosperity in the earlier part of the fourteenth century. These laws expressly make mention of insurances, and provide, that if the merchant oblige the master to insure the *ship*, the merchant should be obliged to insure the master's *life* against the hazards of the sea.[1]

§ 31. There is, however, no ground for attributing to the merchants of the north the honor of being the inventors of the contract of insurance, and no reasonable ground can be entertained that the invention is due to Italy, one evidence of which is the derivation of the name of the contract from the Italian.[2] But besides the light of etymology, there exists a high degree of probability, that the Lombards were the earliest people of the European States in the use of insurance; but the commencement of the practice of insurance, says Mr. Duer, (who has minutely treated of the history of insurance in modern times,[3]) in Italy, cannot upon any hypothesis be referred to a later date than the beginning of the thirteenth century. A colony of Lombards was in that century settled in London, and conducted for a long time almost exclusively the foreign trade of the kingdom. The policy of marine insurance even of the present day, is an antique form of contract used by the

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1 Dowd. on Fire and Life Ins. 6. And see 1 Duer on Ins. 40, *et seq.*

2 See *ante*, § 4.

3 1 Duer on Ins. Introd. Discourse, Lect. II.

Lombards, to which fact there is reference in the instrument itself.[1] The first regular system of commercial *law* was drawn up at Barcelona, in the year 1435,[2] yet it has never been asserted or supposed, that insurance was introduced into the maritime cities of Spain at a period much earlier than into the rest of Europe. The preamble to the Ordinance of Barcelona referred to, recites, — "Whereas in times past few ordinances of insurance have been made," — from which it is necessarily to be inferred that the matter had at some period considerably antecedent assumed such general importance as to have called for and formed the subject of legislation, and was then well understood.[3] The next ordinance on this subject was published at Florence in the year 1523, after that city had been elevated to a high point of commercial greatness by the wisdom, abilities, and brilliant success of the family of Medicis. Still later, the Emperor Charles V., in 1523, published a number of regulations, concerning marine insurance, called the "Caroline" code, to which his son, Philip II., added several new ordinances, in 1563 and 1565.[4] For the improvement of the system of commercial law, Europe was under early obligations to the famous ordinance of Louis XIV. published in 1681, and much is also due to the labors of the author of "Le Guidon," (republished by Cleirac, Rouen, 1670,) and of Pothier, Emerigon, Roccus, Casaregis, Cocennius, Bynkershoek, and Santerna.[5]

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[1] See *Ante*, § 4, and Pref. to Beaumont on Fire and Life Ins.

[2] Emerigon, Pref. p. 11.

[3] Dowd. on Life and Fire Ins. 8.

[4] See 1 Marsh. on Ins. 20.

[5] Nearly connected with the advancement of the practice of marine insur-

§ 32. In England, the feudal antipathy to mercantile pursuits, and the insecurity of a wealthy burgher, so long as the feudal system continued, the short intervals of repose from foreign warfare which succeeded the relaxation of that system, and preceded the domestic wars of the Houses of York and Lancaster, and the desolation of that country during the stormy period of their continuance, precluded any great advancement in commerce. Then, the unsettled state of the public mind, in England, attendant upon the Reformation there, further retarded the arts of civilization until the establishment on the throne of Queen Elizabeth.[1] Hence was it that England was one of the last nations of Europe which availed itself of its great commercial advantages; though ample amends have since been made for its long-continued commercial inactivity.

§ 33. Though foreign commerce increased considerably in the reign of Elizabeth, and insurance probably in a proportionate degree, yet so little were the English judicial tribunals acquainted with the nature of the contract of insurance, that so late as the 30th and 31st of that Queen, it became a question (as appears by the most ancient case to be found in England on the subject of insurance,[2]) where an action on a policy of insurance

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ance was the invention of the *mariner's compass*, or at least its introduction into Europe, about the year 1260; this, with the consequent improvements in navigation, opened a wide field for maritime enterprise. 1 Marsh. on Ins. 9.

1 Dowd. on Life and Fire Ins. 9; Preliminary Discourse to Marsh. on Ins., and Introd. to Park on Ins., and Pref. to Beaum. on Life and Fire Ins.

2 6 Coke, R. 47 b.

should be tried, the policy having been effected in London, and the ship detained in the river Soane, in France. Park, in his work on insurance,[1] considers this "as the best proof, that prior to the reign of Elizabeth, this contract could have been but very little, if at all known." In her reign, however, the commercial genius of the English had begun so far to be displayed, that the legislature begun to turn its attention to matters of insurance, and to regard their regulation as worthy of the most serious attention; and in the 43d year of her reign, a statute was passed for the constitution of a special court for the trial of disputes arising under policies of insurance in a *summary way*. To that end the statute ordained, that a commission should issue yearly to the judge of the Admiralty, the Recorder of London, two doctors of the civil law, two common lawyers, and eight merchants, empowering any five of them to hear and determine all such causes arising in London; and it also gave an appeal from their decision, by way of bill, to the Court of Chancery. This special tribunal, it appears, neglected its duties, and gradually fell into disuse; and its jurisdiction begun also to be contracted by the decisions of the Court at Westminster.[2] In one case it seemed to

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[1] Park on Ins. p. xliv. of Introd.

[2] Park says,in reference to this Court erected by the statute of Elizabeth, and which, as above stated, fell into disuse, that "it is perhaps one of the strongest arguments that can be adduced to prove that such ajudicature is not congenial to the spirit and disposition of Britons, nor well adapted for the purposes of its institution. It is universally agreed by all writers upon jurisprudence, that nothing tends so much to the elucidation of truth, and the detection of fraud, as the open *viva voce* examination of witnesses in the presence of all mankind; before judges, who, from their knowledge of books and men, acquired by long study and experience, are well qualified to discriminate

be the opinion of the Court of King's Bench, that the jurisdiction of this newly created court did not extend to suits brought by the insurer against the assured; but only to such as were prosecuted by the latter against the former.[1] But a case, reported in Siderfin,[2] struck a more severe blow at this court than any one case which preceded it; for it was there held, that it was no bar to an action on a policy of insurance at the common law, to say, that the plaintiff had sued the defendant for the same cause, in the court erected by the statute of Elizabeth.

§ 34. It has been computed,[3] that all the cases to be found in England relative to policies of insurance, from the beginning of the eighteenth century, to the year 1756, when Lord Mansfield became Chief Justice of the Court of King's Bench, did not exceed sixty; and even those which were reported in that interval, were loose notes containing a short opinion of a single judge, and very often no opinion at all, but merely a general verdict. It has been said by a learned American judge,[4] that the whole law of insurance is scarcely a century old; and that more than half of its most important principles and distinctions have been created within the last fifty years.

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and decide between right and wrong; and before TWELVE UPRIGHT CITIZENS, who have an opportunity of observing the appearance, countenance, inclination, and deportment of those who are thus examined on oath." Introd. to Park on Ins. xlvii.

1 Dalbie *v.* Proudfoot, 1 Show. R. 396.

2 Came *v.* Moy, 2 Sid. R. 121.

3 Introd. to Park on Ins. p. xlviii.

4 1 Story, Eq. Jurisp. p. 23, § 20.

The defects in the state of the law of insurance in England before Lord Mansfield's administration, it was one of the first acts of his administration to remedy, and it was under his auspices that that branch of the law was organized and grew up into a system, a system "remarkable for the excellence of its principles, and the good sense and simplicity of its practice."[1] When Sir William Blackstone published the second volume of his Commentaries, Lord Mansfield had presided in the Court of King's Bench for nearly ten years; and during that space of time, the learning relating to marine insurance had been so extensively cultivated, that he concluded that if the principles settled were well and judiciously collected, they would form a very complete title in the code of commercial jurisprudence.[2]

§ 35. For the purpose of creating a monopoly for two corporations, namely, the Royal Exchange and London Assurance Companies, all other corporations or partnerships were restrained by an act passed in the reign of George I., from insuring ships or merchandise at sea. But under the more enlightened policy of modern times, that injudicious enactment has been entirely abolished by the statute of 5 George IV. c. 114.[3]

§ 36. For an adequate understanding of the extent of the use of the contract of marine insurance, and of the present condition of the law in relation to it, in our own

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1 Roscoe, Lives of Lawyers, 216, 217; Warren, Law Stud. 357.

2 See 3 Kent, Comm. 349 – 352.

3 Coll. on Part. § 62.

country, we have only to have recourse to the "Law and Practice of Marine Insurance," the justly celebrated work of Mr. Duer. "The adjudged cases," says this very learned writer, "in the reported decisions of the courts of Common Law in England, and in the United States, constitute by far the richest and most abundant source whence the law of insurance, as it now exists, is or can be derived;" and he refers to the insurance cases in the reports of the States of New York, Massachusetts, Pennsylvania, Maryland, and of those of the Supreme Court of the United States, from the beginning of this century to the year 1840, with those to be found in the English reports during the same period. He also refers to the treatise of Mr. Phillips on insurance, as embracing a full collection of American decisions, and the work he considers is by no means to be regarded as a mere compilation of cases; but, on the other hand, is a work of reasoning, as well as of research. He likewise recommends the much admired compendium of the law of insurance contained in the third volume of the Commentaries of Kent, as worthy of entire confidence and diligent study.[1]

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[1] 1 Duer on Ins. Lect. II. of Introd. Discourse, 51, 52. This author says of Kent's compendium, above referred to, that "its merits cannot be described in language more forcible and just than the author himself has applied to the treatise of Roccus," namely, "It is distinguished by the soundness of its logic, its admirable precision, and vast power of compression."

FIRE INSURANCE.

CHAPTER I.

OF THE ORIGIN, HISTORY, AND IMPORTANCE OF FIRE INSURANCE.

§ 37. In policies of Marine Insurance, of which we have just given some account, there is usually, if not universally, contained an indemnity against loss or damage *by fire* during the voyage, or term for which the insurance was effected; and nothing is more natural or more reasonably to have been expected, than a conversion of the security which had long afforded protection against injuries to ships and vessels occasioned by fire, to the purpose of yielding protection to property on land.

§ 38. By the brief sketch of the history of Marine Insurance just adverted to, it appears, with the reasons for it, that this branch of the law of insurance was not practised to any considerable extent in England until the reign of Elizabeth, although it was there introduced many years before, by the Lombards.[1] The insurance of *houses* and *goods*, &c., in London, begun in 1667, which was the year following the "great

[1] See *ante*, § 4, 31, 32, 33.

fire of London."[1] The severely calamitous effects of that event inculcated the necessity of some general system of Fire Insurance, and the city on the fifteenth of October, 1681, resolved, that lands and ground rents to the value of £100,000 should be settled, together with the sums to be received for premiums, as a fund for the insurance of houses. This project having proved abortive, the scheme of a Mutual Insurance Office, which had been suggested as early as the year 1669,[2] was substituted, and in 1696 an association founded upon the simple principle of contribution, in the shape of annual premiums proportioned to the amount of the property insured, to a common fund, out of which the losses of its various members were to be made good, was established under the appropriate title of the "Hand in Hand, or Amicable Contribution Society." The utility of this institution was immediately acknowledged by the public, and in 1718, three thousand six hundred and sixty-six houses were insured by it. In Edinburg, about the year 1670, there was erected a company for friendly insurance against fire, consisting of a number of private contributors, who agreed to insure each other. The insurance was not personal, like the modern fire insurance, but the interest and stock and benefit were inseparably annexed to the houses insured as long as the contribution was continued.[3] The Sun Fire Office, in London, was established in 1710, being the next in point of date; and since that time, a great number of similar institutions have arisen in England.[4] "In London," says Magens,[5] "insurances from fire are obtainable at such easy rates, that there are few merchants but choose to be insured for their own quiet; besides," he continues, "this precaution adds to their credit both at home and abroad,

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[1] Hayden's Dict. of Dates, Tit. "Insurance;" Beckman's Hist. of Discoveries, vol. 1, p. 393.

[2] Ibid.

[3] 1 Bell, Comm. 543.

[4] Dowd. on Life and Fire Ins. 12, 13; 2 Marsh. on Ins. 786.

[5] 1 Magens' Essay on Insurance, published in 1755, p. 31.

when it is known that their great capitals lying in their houses and warehouses are thus secured from the flames."

§ 3. In the other countries of Europe, Fire Insurance has not been as long introduced nor so extensively practised. In 1754, one of the companies established in Paris for marine insurances, obtained from the government permission to make insurances against fire, but it may be collected from Pothier,[1] that they were comparatively little used on the continent in his time. Magens,[2] who wrote in 1755, speaks of insurances against fire as having been introduced into several countries of Europe, though not everywhere under that denomination; and he says, that at Hamburgh there is *fire cassa* of long standing wherein the principal houses are insured at the value of *fifteen thousand marks*, (or about £1,000 sterling,) to be paid in case of their being burnt. The same writer further says — "he must hint, that it is not a little surprising that in so fine a place as Hamburgh is, an insurance on merchandise from fire has not been settled, either by their *fire cassa* or some other society, since the risk there cannot be judged so great as elsewhere, by reason of the vast plenty of water; and the dispositions they have made for the extinguishing of fires."[3] The people of Holland have also relied so much upon their own caution for the prevention of fires, that although insurance is not unknown among them, few of them have sought its protection.[4] At the present moment, the character and credit of the English Insurance Offices stand so high, that they are frequently, and it is believed very generally, resorted to by their continental neighbors.[5]

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[1] Pothier, Tit. Des Assurances, sec. 1.

[2] Essay on Insurance, 213.

[3] 1 Magens, 31, and see 1 Westkett, 213.

[4] 2 Marsh. on Insurance, 785. This writer says — "I have heard it confidently asserted by persons well acquainted with the cities both of London and Amsterdam, that after making all fair allowances, there is, upon an average, more property destroyed by fire in the former in one year, than in the latter in ten."

[5] Dowd. on Fire and Life Ins. 13.

§ 4. An insurance company, on the principle of the ancient London "Hand in Hand" company — the mutual contribution principle — existed in the city of New York for many years after the peace of 1783, and before incorporated companies, with capital stock, became very common. Formerly the English fire insurance companies were at liberty to insure property in that city, by the means of an agency established there. This, says Kent,[1] was deemed by the citizens of New York as the safest source, owing to the great capitals of those English companies, to apply to for indemnity against fire. But a different policy afterwards prevailed with the legislature of the State of New York. A prohibitory act by them passed, applicable to such cases, was defeated in 1807, and again in 1809, by the objections of the Council of Revision, which were drawn and submitted to the Council, by the late Chancellor Kent, then a member of that Council. But, on the 18th day of March, 1814, the prohibition passed into a law. The prohibition was originally confined to all foreign insurances against fire; by the act of the Legislature of the State of New York, of May 1st, 1829, c. 336, the prohibition was extended to marine insurance and bottomry, and this is still the existing law of that State;[2] and this prohibition has been since relaxed, and reduced to a small tax on premiums. The great conflagration in the city of New York, on the night of the 16th and morning of the 17th of December, 1835, was unexampled in this country since fire-insurance was practised, in the "rapidity," says Chancellor Kent, "and violence of its ravages, and in the amount of the property destroyed. It, of course, absorbed the capital of many of the most solidly established Fire Insurance Companies, and rendered them insolvent. This was an extraordinary case, and without precedent, and was not within the reach of ordinary calculation."[3]

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[1] 3 Kent, Comm. 371, note *a*, 5th Ed.

[2] See Rev. Statutes of New York, vol. i., 714; vol. iii., 557; Laws of New York, February 21, 1837, c. 30.

[3] 3 Kent, Comm. 371, note *a*, 5th Ed.

In the extent of its transactions, Fire Insurance has, in England, far exceeded its prototype, Maritime Insurance;[1] and associations for insurance against fire, have extended their dealings to every part of the United States, and gained public confidence by the solidity of their capitals.[2]

§ 5. The great utility both in a public and private point of view of the contract of marine insurance, as an incentive to industry and enterprise, has already been commented upon,[3] and it is almost superfluous to enter upon a detail of the advantages which mankind have derived from the sort of insurance immediately under consideration; they are obvious, as Park says,[4] to every understanding. "We may lay it down," says James,[5] "as a maxim, that every one, possessed of either small or considerable property in houses or chattels should protect himself by means of a *policy of fire insurance;* for however careful himself or family may be, he is at no time free from the liability to danger, occasioned by the carlessness or misfortune of his neighbor; and accidents by fire are caused frequently by such trivial and unaccountable circumstances, that it is impossible wholly to fence against them. Reverting, says he, to the principles of Fire Insurance, it has been observed, that the theory of probabilities which are an essential element of Life Assurance, may also be applied to Fire Assurance, as, being based on registers of facts, it goes on the simple presumption, that what HAS happened before *may*, and most probably WILL, happen again under similar circumstances." [6]

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1 Dowd. on Fire and Life Ins. 13.

2 3 Kent, Comm. 371.

3 See *ante*, § 10.

4 Park on Ins. 441.

5 James on Life and Fire Ins. 85.

6 "The result," says James, "has been fully demonstrated by experience — taking the average number of fires that have occurred in the nine years before 1845, as the probable number of fires that will happen in each trade, or, which is the same thing, the number of claims which will be made on the funds of each society in the year 1845 — presuming the number

§ 6. But, although it cannot be denied that this species of insurance affords great relief to individuals and often preserves

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engaged in each trade in the Metropolis to be correctly stated in the Directory, and each trade to be associated into a separate club for assuring themselves against fire; we find the results to be as follows: —

Numbers.	Number of Fires. By Theory.	Number of Fires. By Experience.
Bakers' Society . .	2251 — $\frac{41}{2251}$ 1 to	161 — $\frac{18}{2251}$ or 1 to 145
Carpenters	1360 — $\frac{27}{1360}$ 1 to	50 — $\frac{19}{1360}$ or 1 to 72
Linen Drapers	815 — $\frac{17}{815}$ 1 to	48 — $\frac{20}{815}$ or 1 to 41
Printers	648 — $\frac{5}{648}$ 1 to	130 — $\frac{5}{648}$ or 1 to 130
Publicans . .	4336 — $\frac{33}{4336}$ 1 to	131 — $\frac{31}{4336}$ or 1 to 140
Wine Merchants . . .	910 — $\frac{6}{910}$ 1 to	151 — $\frac{7}{910}$ or 1 to 130
	671	658

The fractions here given express the *probability* of the number of claims occurring to any individual member of the society, and his proportion of the total fund to be raised to meet the claims, and of the *actual* experience of each society in the year 1845. If, instead of to six independent societies, all the cases had been taken to one general insurance office, the *experience* of that office would, on the aggregate, have departed but very slightly from the result estimated by the theory of probabilities: whilst the theorist would say, 'Your fires in these six kinds of risks will probably be 671 in the next year,' the actual experience of the office would be 658, only thirteen short of the number brought out by the theory, — a difference of only two per cent. The following table shows the number of fires happening in London, from 1836 to 1845 inclusive, with the yearly average, loss of life, and relative insurances effected: —

	Effects.						Insurances effected.			
Fires.	Totally destroyed.	Seriously damaged.	Slightly damaged.	Lives lost.	Alarms from Chimneys on Fire.	False Alarms.	Buildings and Contents.	Buildings only.	Contents only.	Neither.
Tot. 6581	263	1947	4371	217	997	747	2475	963	965	2178
Av. 658.1	26.3	194.7	437.1	21.7	99.7	74.7	247.5	96.3	96.5	217.8

One item alone in the above statement presents, indeed, a most alarming result; no less than the loss of the lives of 217 human beings, or an average of nearly 22 per annum: a state of things which we hope may induce more careful and temperate habits on the part of the population generally, and a rigid attention to at least the ordinary precautions against

whole families from ruin, it has been doubted, even by wise and intelligent persons, whether in a general, or national point of view, the benefits resulting from it are not more then counterbalanced by the mischief it occasions. The objections, in that point of view, which have been urged, are carelessness and inattention which security naturally creates, and temptation to arson. But, though it be admitted, that this species of insurance has been sometimes the cause of fires by carelessness, and even of intentional fires, the benefits, as a national concern, vastly outweigh the mischiefs which have been ascribed to, and which have undoubtedly, on some occasions, proceeded from it.[1] The public have an interest in maintaining the validity of policies of insurance against fire, as they have a tendency to keep premiums down to the lowest rate; and to uphold associations for the purpose of insuring against fire, so essential to the present state of the country for the protection of the vast interests embarked in manufactures, and in consignments of goods in warehouses.[2] As the practice of insurance against fire, on the property of the foreign merchant,

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accidents by fire; for however beneficially the operations of insurance companies may act, with respect to compensation for damage sustained in property, they can offer no assistance in reducing the risk of fire, or making any possible reparation for the sacrifice of human life. With the hope of directing attention to the more prevalent sources of accident, we enumerate some of the causes of Metropolitan fires: —

CAUSES.	1842.	1843.	1844.	1845.
Defective or foul flues in chimneys	60	69	62	58
Setting fire to bed-curtains	44	48	80	49
Gas, accidents with	52	40	33	54
Setting fire to window-curtains	58	69	45	47
Candles, accidents with	67	49	80	69
Linen hung before fires	41	33	45	28
Stoves overheated, or defective	27	24	19	21
Carelessness, palpable	19	21	12	13
Loose shavings	22	31	18	18
Unavoidable fires	24	19	9	12

[1] 2 Marsh. on Ins. 783; 3 Kent, Comm. 371.

[2] Carpenter *v.* Providence Washington Ins. Co. 16 Peters, (U. S.) R. 495.

in the hands of his consignees, greatly tends to promote the interests of trade, it ought to be upheld by any means not inconsistent with established rules of law.[1]

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[1] Per Oakley, J., in De Forest v. Fulton Fire Ins. Co. 1 Hall, (N. Y.) R. 130.

CHAPTER II.

GENERAL NATURE OF A POLICY OF FIRE INSURANCE.

§ 7. The contract of Fire Insurance is in the nature of an *indemnity*[1] given by the underwriters or insurers,[2] against such loss or damage by fire as may happen to the assured in respect to his houses, buildings, stock, furniture, ships in port, warehouses and goods laid up in them, or other property covered by the policy, during a prescribed period of time,[3] or, it may be called a transaction effected at an insurance office, whereby, in consideration of a single or periodical payment of *premium*[4] the company agrees to pay to an assured person[5] such loss as may occur to his property described in the policy within the period therein specified, to an amount not exceeding a particular sum fixed for that purpose, by such policy.[6]

§ 8. Insurances against fire are most generally effected by *companies*, (though they may be made by any single individual who is competent to enter into other contracts,) the institution of which concentrates the power requisite to give a *practical* effect to the *theoretical* principles of insurance. The conflagration of a cotton-mill, like the loss of a ship, is a calamity that would fall heavily even on the richest individual; but when distributed among several individuals, as above mentioned, each would feel it proportionally less; and provided the number of those among whom it is distributed was very considerable, the inconvenience it would occasion to one in particular would be inconsiderable. Companies for the

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[1] See *ante*, § 1. [2] See *ante*, § 7.

[3] Park on Ins. 9; 2 Marsh. on Ins.; 3 Kent, Comm. 370; Ellis, 1.

[4] See *ante*, § 6. [5] See *ante*, § 7.

[6] Whart. Lex.; 2 Steph. Comm. 180; DeForest *v.* Fulton Fire Ins. Co. 1 Hall, (N. Y.) R. 84.

carrying on of the business of insurance have generally a large capital or such a number of proprietors as enables them to raise, without difficulty, whatever sums may at any time be necessary to make good losses, and they do not limit their risks to small sums. It is the magnitude of their capitals, says McCulloch, that affords them the means of easily defraying a heavy loss, and their premiums being proportioned to their risks, their profit is, at an average, independent of such contingencies.[1] In addition to the influence which the high standing of the directors of a company may be able to bring to bear upon their business-arrangements, other and active auxiliaries have been found expedient in extending the operations of an association beyond the mere limits of its place of establishment. Branch offices or *agencies* were thus suggested, which have been found eminently conducive to the objects in view; and it is with them to point out the advantages of the institution they represent, and to pay minute attention to their instructions.[2]

§ 9. Whenever such companies are incorporated, as in this country is almost invariably the case, care should be exercised that the mode of pursuing their business prescribed by their charters is observed. Where, for example, an act incorporating an insurance company provides that all policies and other instruments made and signed by the president or any other officer of the company, shall be good and effectual to bind the company, a contract to cancel a policy must be signed by the president or other officer, in order to bind the corporation.[3]

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[1] McCulloch, Com. Dict. The first circumstance that cannot fail to strike the general inquirer into the practice of marine insurance, in England, is that while all the fire insurances are made at the risk of companies which include within themselves the desirable requisites of security, wealth, and numbers, the great bulk of marine insurances are made at the risk of individuals.

[2] See James on Life and Fire Ins. 80.

[3] Head *v.* Providence Ins. Co., 2 Cranch, (U. S.) R. 127. See the law on this subject, and the rule above stated, with its qualifications, considered in Angell & Ames on Corp. 4th Ed. § 253.

§ 10. Some fire insurance companies insure at their own risk, and others are *mutual* associations. The leading principle of mutual insurance companies is, that each person whose property is insured becomes a corporator, or a member of the company; and consequently is bound to take notice of the by-laws.[1] It is obvious, then, that mutual insurance companies should have the power of exercising their own discretion in the selection of persons whom they may admit to membership, and whose property they may insure; as the character of the person assured may be of importance.[2] The safety of an insurance company of this sort, is the exercise of care in not insuring much property at any one point; for the more their insurances are scattered, the more is it for their interests.[3] Their capital consists of deposit notes, or of such amount of premiums as, by their act of incorporation, they are required to have subscribed before commencing business, and afterwards of such sums as they may accumulate from premiums earned, and other sources of profits, and which are used by them as capital in the business of insurance.[4]

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1 Susquehanna Ins. Co. *v.* Perrière, 7 Watts, S., (Penn.) R. 348; Liscomb *v.* Boston Mutual Fire Ins. Co., 9 Met. (Mass.) R. 205.

2 Lane *v.* M. & M. Fire Ins. Co., 3 Fairf. (Me.) R. 44; Abbott *v.* Hampden Mutual Fire Ins. Co., 17 Shep. (Me.) R. 414; Brown *v.* Thomaston Ins. Co., 15 Shep. (Me.) R. 252; Wilson *v.* Hill, 3 Met. (Mass.) R. 66; Hamilton *v.* Lycoming Ins. Co., 5 Barr. (Penn.) R. 339.

3 Coster *v.* Alleghany County Mutual Fire Ins. Co., 1 Barr. (Penn.) R. 332; Rhinehart *v.* Same, Ibid. 359. In this last case the plaintiffs in error, by their by-laws, made insurances for five years. After the distressing fire in the city of Pittsburgh, of the 10th of April, 1845, they made a call of 20 per cent. on their premium notes, and contended that this was as much as they were bound to call in, in any one year. In this way they desired to apportion their effects, so as to have a fifth of their capital to meet any loss which might happen to them that year. This construction, the court held, would be contrary to justice, and the express provisions of their charters. The directors of the company were bound to call in an amount equal to the loss; if the loss exceeded the effects of the company, they were to be paid *pro ratâ*. The corporators were bound to know the terms on which they were insured.

4 Sun Mutual Ins. Co. *v.* Mayor, &c., of New York, 8 Barb. (N. Y.)

§ 11. In fire insurance generally, there is nothing corresponding with the *valued* policies used in marine insurance,[1]

Sup. Ct. R. 450. The question presented in this case was, whether the accumulated net profits upon insurances which were then remaining in the hands of the Sun Mutual Insurance Company, or which had been invested by it, were taxable as against the company under the provisions of the New York revised statutes. The idea of their exemption was founded on the argument that all the large amount in the possession of the company did not belong to the company but to the members of it, who were alone liable to taxation for it. By Edmonds, presiding judge: "I apprehend that this is a mistaken view of the case, and that they have capital within the meaning of the statute, though in some respects attended with characteristics different from those which marked the old fashioned companies. Thus, in the other companies, the whole amount of the capital was limited to the sum mentioned in the act of incorporation, but in mutual companies it is unlimited in amount, and may be swelled up to any sum which they may earn and lay by for the purposes of their business. In the former, the shares were all of an equal amount with each other, and an inequality of interest could be brought about only by a member's owning a greater or lesser number of shares. But in the mutual companies the amounts of the respective shares may be unequal in the outset, depending as they do solely on the amount of premium which may be paid. Except in these two respects I can discover no difference in the two kinds of companies, as to their capital. In both, the ownership of a share constitutes membership; each share has a vote; is property belonging to the member; is transferable; is liable to augmentation or diminution in value by losses or gains in the corporate capacity; and is entitled to have dividends declared upon it. Every element ever entering into a share of stock in any corporation, does, it seems to me, enter into a share in a mutual company. There is, it is true, another difference, but it in no way affects this question. I allude to the manner in which the capital is made up. In one case it is made up by a subscription of so many shares towards the specified amount of capital. In the other it is made up by applications for insurance, and premiums paid thereon. The only essential difference being that in the latter case the subscriber has a right to an insurance for his money, as well as to membership. But the amount thus subscribed is in both cases capital; it is that which the members have invested in the business of insurance; which is to remain unimpaired by any thing but losses, and is that out of which profits are to be made. This, it appears to me, is clearly the intention of the statute. The 4th section of the act of

[1] See *ante*, § 5.

and the assured recovers according to his loss as established in evidence.[1] The loss by fire is very seldom a total loss, and the valuation in the policy is rather the fixing of a *maximum* beyond which the underwriters are not to be liable, than the conclusive ascertainment of the value to be replaced. Accordingly, on the occasion of every fire, there is an inquiry into the amount of the loss.[2]

§ 12. But a policy against fire differs from a marine policy in the usual forms of the two classes of policies. The latter is most commonly general in its terms, comprehending in its indemnity all who are interested in the subject of insurance; while the former limits its protection to those who are specially named in it. It is the difference in the terms of the different contracts, that creates the difference in the nature and extent of the insurance.[3] Lord Chief Justice Kenyon has expressed

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incorporation forbids the company's going into operation until applications for insurance to the amount of $500,000 shall be received; the company thus starting into life with a capital consisting of the premiums paid on that amount of insurance. To guard against a diminution of that amount of capital, it is provided that the premium on every first insurance shall never be withdrawn from the company in the shape of dividends; and to accumulate and preserve an adequate amount of capital it is further provided that no dividend shall be paid until its net profits shall exceed half a million of dollars. So that though this company may have commenced business with a capital of only some $50,000, it was compelled by its charter to accumulate its earnings till they amounted to $500,000, and may accumulate until they shall amount to ten times that sum or more. And that which is thus accumulated may be invested in bonds and mortgages and stocks, as the capitals of other insurance companies were allowed to be invested." It was therefore held, by the learned judge, (Mitchell, J., concurring, and Edwards, J., dissenting,) that the company was liable to taxation, the same as other monied corporations.

[1] 2 Phill. on Ins. 582; and opinion of Sandford, J., in Niblo *v.* North American Ins. Co. 1 Sandf. (N. Y.) Sup. Ct. R. 556.

[2] See 1 Bell, Comm. 542.

[3] Per Jones, C. J., in De Forest *v.* Fulton Fire Ins. Co. 1 Hall, (N. Y.) R. 84; Jolly *v.* Baltimore Equitable Society, 1 H. & Gill, (Md.) R. 295.

the opinion, that fire insurance is as much to be favored as marine insurance, and that in the construction of instruments relating to either, the *obvious intention* of the parties is to prevail; and the words of the convenantor, according to Lord Bacon, *fortius accipiuntur contrà preferentem.*[1] The sense and meaning of the policy is to be ascertained from its terms, taken in their *plain and ordinary signification;* unless such terms have, by the known usage of trade, in respect to the subject-matter, acquired a sense distinct from the popular sense of the same terms; or unless the policy itself taken together, shows that they were understood in some peculiar manner.[2] The words expressing the underwriter's obligation may be "insure," "indemnify," "make good loss," or "pay loss," or any other words which signify, that money is to be paid in case of loss.[3]

§ 13. The *printed* forms of fire insurance,[4] are calculated for ordinary risks, and contain the provisions and conditions usually attached to insurances upon them; and hence they must be necessarily general and comprehensive in their terms, and cannot be adapted to insurances upon other and *special* hazards. The ordinary course of effecting insurance is, that upon each application, a special agreement is made between the applicant and the underwriter, designating and describing

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[1] Tarleton *v.* Stainsworth, 5 T. R. 695; and see Stacey *v.* Franklin Ins. Co. 2 Watts & S. (Penn.) R. 545.

[2] Robertson *v.* French, 4 East, R. 135.

[3] Beaumont on Ins. 8. Good faith is to be given in the contract of insurance; and the subtleties of the law are to be made to yield to that equity, which is the soul of commerce. The clauses of the contract are to be interpreted according to the style, the custom, and usage of the place where the insurance has been made, though the indication of the common law might appear different. In determining the extent of the reciprocal obligations between the insurers and the assured, the words of the contract are to be taken together with the intention of the parties. Emerigon on Ins. (Am. Ed. by Meredith,) c. 1, s. 6, p. 20.

[4] See *ante*, § 14.

the premises required to be insured, and settling the terms of that particular insurance; and the policy is then completed by filling up the blank spaces, left for that purpose in the printed form, with suitable words and clauses to express the contract thus agreed upon. The *written* clauses are considered to contain the elements of the contract, and being framed under the immediate eye of the parties, and without a reference to the terms of the previous arrangement between them, they not unfrequently present a contract to which some of the *printed* parts of the policy are inapplicable; and as effect must be given to the acknowledged *intention of the parties*, they must necessarily supersede or control such of the printed clauses as would, if enforced and literally applied, be inconsistent with them.[1] In a case which turned upon the construction of a *charter-party*, it was said by Baron Parke, — "I give no opinion as to the different weight to be attributed to the written or printed words of the instrument; that would depend on the usage of trade; if the whole instrument were set out on the record, there would be no distinction between the written and the printed words, unless a statement to that effect were introduced. I may observe, however, that *policies of insurance* are instruments to which mercantile usage has assigned a certain meaning, and in their case the written part may reasonably be entitled to more weight than the printed."[2]

§ 14. The policy may be in the form of a *bond*, or of any other form,[3] so that the scope and meaning of it is an insurance[4]; and a paper purporting to be conditions of insurance,

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[1] By Jones, C. J., in Delonguemare *v.* Tradesman's Ins. Co. 2 Hall, (N. Y.) R. 589; Robertson *v.* French, 4 East, R. 129, cited *ante*, § 15.

[2] Alsager *v.* St. Katherine's Dock Co. 14 M. & Welsb. R. 794. As to the effect of written, in controlling printed clauses in policies of insurance, see Coster *v.* Phœnix Ins. Co. 2 Wash. (Cir. Co.) R. 51; Grousset *v.* Sea Ins. Co. 24 Wend. (N. Y.) R. 209.

[3] See *ante*, § 11, 12, *et seq.*

[4] When the Protector Fire Office was instituted, the policy was laid before one of the most eminent common lawyers, and one equally eminent

if annexed to, and delivered with, a fire policy, is *primâ facie* a part of it, although the policy does not contain any express reference to such paper; the juxtaposition of the papers denotes the intention of the parties though the evidence may be rebutted by parol evidence, as by showing, that the papers were connected by mistake.[1] When reference is made in a policy to another document or paper, the contents of the document or paper become a part of it, although not actually embodied in the policy;[2] but to have this effect, there must be an *express stipulation*, that the policy was made and accepted in reference to such other document or paper, (e. g. aplication for insurance and conditions annexed.[3]) The words — "Reference being had to the application of said H. (the assured) for a more particular description and the conditions annexed, *as forming a part of this policy*," makes the conditions annexed to it, and the application, as much a part of the policy as if they had been written on its face.[4] But without so clear and express a stipulation, the court would not hear evidence, that it was the custom of the insurer to consider a written memo-

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as a conveyancer, for the purpose of giving the public the best security upon this subject. Ellis, 2. See the form, Appx. p. v.

[1] Murdock *v.* Chenango County Mutual Fire Ins. Co. 13 Comst. (N. Y.) R. 210; Roberts *v.* Chenango County Mutual Ins. Co. 3 Hill, (N. Y.) R. 501; Beadle *v.* Same, Ibid. 161; Duncan *v.* Sun Fire Ins. Co. 6 Wend. (N. Y.) R. 488; Sexton *v.* Montgomery County Mutual Ins. Co. 9 Barb. (N. Y.) Sup. Ct. R. 191. As a general rule, an indorsement made upon an instrument before it is executed, may be parcel of the obligation. Emerson *v.* Murray, 4 N. Hamp. R. 171; it being a contemporary act. Burgh *v.* Preston, 8 T. R. 483; Stocking *v.* Fairchild, 5 Pick. (Mass.) R. 181; Etna Fire Ins. Co. *v.* Tyler, 16 Wend. (N. Y.) R. 399.

[2] 1 Duer, 19, *et seq.*; Burritt *v.* Saratoga Mutual Fire Ins. Co. 5 Hill, (N. Y.) R. 188.

[3] Snyder *v.* Farmers Ins. and Loan Co. 13 Wend. (N. Y.) 92; Jefferson Ins. Co. *v.* Cotheal, 7 Wend. (N. Y.) R. 72; Andrews *v.* Essex Fire and Marine Ins. Co. 3 Mason, (Cir. Co.) R. 6; Delonguemare *v.* Tradesman's Ins. Co. 2 Hall, (N. Y.) R. 589; Stebbins *v.* Globe Ins. Co. 2 Ibid. 632.

[4] Jennings *v.* Chenango County Mutual Ins. Co. 2 Denio, (N. Y.) R. 75; Burritt *v.* Chenango County Mutual Ins. Co. 5 Hill, (N. Y.) R. 188.

randum, wrapped up in, or wafered to a policy, as a part of such policy.[1]

§ 15. The principles on which the ratio of premiums paid for fire insurance is determined, are simply those which experience shows to be most equitable, according to the number of fires and the amount of property consumed on the average of a great number of years. If the premium is felt to be too high, the competition between different companies will generally bring it down to a proper level. The offices, in general, in order to render the operative part of the contract more concise, introduce the scale of premiums applicable to the different risks by indorsement upon the policy, referring to them, so as to make them a part of the contract; and these indorsements usually consist of a table of premiums to be paid — 1. In respect of such as are called "common insurances," or those for which the lowest rate of premium is to be paid, as buildings, which, from their construction, materials, or use, are exposed to the least degree of hazard. 2. In respect of such as are called "hazardous insurances," as buildings, which, from their materials or construction are more susceptible of ignition, but in which no hazardous trades are carried on, or hazardous goods deposited; *buildings* not of a hazardous nature, as those of the *first* class, but in which hazardous trades are carried on, or some circumstances of hazard are attached, as the presence of stoves; the *stock* and *goods* of various specified traders, whose occupation exposes the goods to hazard; various specified articles of trade of a hazardous nature deposited in buildings not hazardous. For insuring these a higher rate of premium is to be paid.[2] 3. In

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1 Pawson *v.* Burnevelt, Doug. R. 12, note; and see Beaum. on Ins. 54.

2 Ellis on Life and Fire Insurance, 11. The attention of this author was necessarily directed to the subjects of both fire and life insurance, in consequence of his having been professionally connected with two offices, in England, of very extensive business; and in addition to the experience which that connection afforded him, he was favored by them with much valuable information upon the details and practical operations of business. See his Preface.

respect to such risks as are called "doubly hazardous insurances," such as buildings, which, from their construction or materials are of a hazardous nature, in which hazardous goods are deposited, or hazardous trades are carried on, thus exposing the insurers to an increased liability of ignition, both from the nature of the buildings and the goods contained in them, or trades carried on; for insuring these a still higher premium is to be paid.[1]

§ 16. There are besides, cases of *special* or *extraordinary risk*, as those of sugar refineries and manufactories, not included in the usual tables of premiums. These are most generally made the subjects of special agreements, all the circumstances of the case being taken into consideration. Money and securities for money are not in general insured upon any terms.[2]

§ 17. After these tables of premiums, there usually follow the *conditions* or proposals, which the assured must comply with at his peril, as they form part of the policy and are *conditions precedent*, upon a due compliance with which must depend his right to indemnity in case of loss. The most important conditions are usually to the following effect: The assured, upon effecting a policy, must give an accurate description of the construction and nature of the premises and goods to be insured, for upon that statement the insurers fix the amount of the premium to be paid, or exercise their discretion by rejecting the insurance altogether. This is a point of the utmost importance for a party about to insure, to attend to; for even, without any special condition, a *misrepresentation*, whereby a less premium is paid than would be payable if a true statement had been made, even without a fraudulent intent, would, upon common principles of insurance, be sufficient to render the policy void.[3]

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[1] Ellis on Life and Fire Insurance, 11. [2] Ibid.

[3] See Park on Ins. 285; Fitzherbert *v.* Mather, 1 T. R. 12. See the

§ 18. Where the conditions exhibited one sort of goods as not hazardous, and another as hazardous, the assured cannot offer proof, that no greater risk attached to the insurance of the latter than the former, nor that a particular article, asserted in the conditions to belong to one of the classes, did in reality belong to another class. A description of the goods as belong-

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conditions indorsed, on which the Protector Fire Insurance Company make insurance from loss or damage by fire. Appx. p. v. Dowdeswell, in his small work on Life and Fire Insurances, pp. 82, 83, has the following: "COMMON INSURANCES: — 1. Buildings covered with slates, tiles, or metals, and built on all sides with brick or stone, or separated by party-walls of brick or stone, and wherein no hazardous trade or manufacture is carried on, or hazardous goods deposited. 2. Goods in buildings as above described, such as household goods, plate, wearing apparel, and printed books, liquors in private use, merchandise, and stock, and utensils in trade, not hazardous, — at 1*s.* 6*d.* per cent. per annum, with certain exceptions. HAZARDOUS INSURANCES: — 1. Buildings of timber and plaster, or not separated by partition walls of brick or stone, or not covered with slates, tiles, or metals, and thatched barns and outhouses having no chimney; and buildings falling under the description of common insurances, but in which hazardous goods are deposited, or hazardous trades or manufactures are carried on. 2. Goods, — All the stock and goods of bread-bakers, tallow-chandlers, (not melters,) chemists, inn-holders, and stable-keepers, together with all manner of fodder and corn unthrashed, at 2*s.* 6*d.* per cent. per annum, with certain exceptions. DOUBLY HAZARDOUS INSURANCES: 1. Buildings, — All thatched buildings, having chimneys, or communicating with or adjoining to buildings having one, although no hazardous trade shall be carried on, nor hazardous goods deposited therein; and all hazardous buildings in which hazardous goods are deposited, or hazardous trades carried on. 2. Goods, — All hazardous goods deposited in hazardous buildings, and in thatched buildings having no chimney, nor adjoining to any building having a chimney; also china, glass, mathematical and musical instruments, pictures, and jewels in private use, at 4*s.* 6*d.* per cent. per annum. There are, however, other circumstances enhancing the danger, which may bring the property to be insured with a FOURTH class, which are termed SPECIAL or EXTRAORDINARY risks. This class includes mills and stock contained in them: mills containing any kiln, steam-engine, stove or oven, used in any manufactory, and stock therein, and also any other special hazard. Such special hazard must be set forth in the policy, and according to the probability of injury, the premium is assessed.

ing to the former class, is a warranty of that fact, and is in the nature of a condition precedent. Such a representation extends not merely to the time of taking the policy, but it warrants that the goods shall continue to be of that description during the whole continuance of the policy; and that not merely a part of the goods, but all of them, are, and shall be of that description. It has been consequently held, that where a policy was taken upon "a stock in trade, consisting of not hazardous merchandise," and the insured kept, among other goods, for sale, the articles of oil and glass, which in the "conditions" were denominated "hazardous," the policy was thereby vacated.[1]

§ 19. There is nothing in the common law of England which appears to render it absolutely necessary that contracts of insurance *should be in writing*, though the custom has been to have this sort of evidence of such a contract.[2] We have seen[3] that the name of the instrument "policy" of insurance, derived from the Italian, necessarily imports a *written* contract. In this country, there is no statute in any State, which requires, that the contract shall be reduced to writing; but the opinion has been entertained and expressed, that as the usage of a contract, in this form, has long and universally prevailed, it has probably acquired the force of law, and that it is, at most, doubtful whether an action on the contract, if merely *oral*, could now be sustained.[4] But Chancellor Walworth, in Sandford *v.* Trust Fire Insurance Company,[5] was

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1 Richards *v.* Protection Ins. Co. 17 Shepl. (Me.) R. 273.

2 See *ante*, Introd. § 14, *et seq.*

3 See the opinion of Chancellor Walworth, in Sandford *v.* Trust Fire Ins. Co. 11 Paige, (N. Y.) Ch. R. 547. It has been held in England by Eyre, Ashurst, and Wilson, Justices, sitting as commissioners in chancery, that an insurance not in writing, would be void, as an evasion of the *stamp duty*. Morgan *v.* Mather, 2 Ves. Jun. R. 10. And the English statutes requiring the assured in certain cases to be named in the policy, imply that the contract is in writing. 25 Geo. III. c. 44; 28 Geo. III. c. 56; and see 1 Phill. on Ins. 8.

4 See *ante*, Introd. § 4.

5 1 Duer on Ins. p. 60.

not prepared to say, that in the State of New York, there may not be a valid oral or parol agreement, founded on a good consideration, to execute a written policy of insurance, which a Court of Equity might enforce; although there is no written evidence whatever of the agreement, or any of its stipulations or conditions.[1] Whether the intention of the court, in Smith *v.* Odin, in Pennsylvania,[2] was to decide, that a contract for insurance, could be made without writing, there appears to have been a difference of opinion between two learned writers.[3]

§ 20. Common justice requires that the party who pays the premium should be informed, *by the terms of the written agreement*, what is the contract between him and the underwriters; and it should not be left to the uncertain recollection of any one to prove a different agreement from that which is contained in the written policy. It frequently happens that where negotiations are carried on between parties, and they suppose they understand one another as to the terms of the bargain, they find, when they come to reduce their agreement to writing, that they do not understand it alike; and it is for this reason that *parol* proof is not admissible to vary or alter the terms or legal meaning of a written contract, by showing what either party said while the negotiation was going on. The necessary exceptions to this rule are *mistake*, *fraud*, *misrepresentation*, and *deceit*.[4] But without impugning the great elementary

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[1] Sandford, &c., *ubi sup.*

[2] Smith *v.* Odin, 4 Yeates, (Penn.) R. 468.

[3] Mr. Duer and Mr. Phillips, for which see 1 Duer on Ins. p. 100. The French Code requires a written contract. Com. Co. of France, B. 2, Art. 332; and the Spanish Law is in substance, the same. Spanish Co. of Com. Art. 812, 841. That a policy of fire insurance, when once executed, cannot be controlled by parol evidence. See New York Gas-Light Co. *v.* Mechanics Fire Ins. Co. 2 Hall, (N. Y.) R. 108.

[4] Alston *v.* Mechanics Mutual Ins. Co. 4 Hill, (N. Y.) R. 329, Walworth, Chanc.; Flinn *v.* Tobin, 1 M. & Malk. R. 369; Whitney *v.* Mayer, 13 Mass. R. 172.

principle, that written instruments are not to be varied or contradicted by parol evidence, such evidence, if it merely goes to identify what the writing in a policy of fire insurance referred to is, as a part and parcel of the contract, it is admissible. An action, for instance, was brought upon a policy of insurance against fire by the assignees of an assured, and in the policy it was said, that it was "made and accepted upon the representation of the said assured, contained in his application therefor, to which reference is to be had;" it was considered by the Supreme Court of the United States to be proper to prove by parol testimony, that the representations alleged to have been made by the party assured were actually made by him. The testimony added nothing to what was written, subtracted nothing, changed nothing.[1] A mistake in a policy may be corrected when it clearly appears from the label or other satisfactory evidence, that it was reduced to writing in terms not conformable to the real intention of the parties.[2] And there is no reason why the same thing may not be done for correcting the policy according to the verbal description furnished to the secretary of the office, if the evidence shows that he omitted a material part; the evidence to support such an allegation ought of course, to be clear and strong, of which the jury are to judge.[3]

§ 21. Upon the principle laid down, that where the language of a policy of insurance is explicit and consistent, the understanding and intention of the parties, as it has previously been expressed, (by letter, or otherwise,) is not admissible to change its signification;[4] Mr. Duer remarks, — "The policy, from the time of its execution, with the exception of the cases to be hereafter stated, in which extrinsic proof may be received, constitutes the sole evidence of the agreement of the parties;

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[1] Clark *v.* Manufacturers Ins. Co. 8 How. (U. S.) R. 235.

[2] Motteux *v.* London Assur. Co. 1 Atk. R. 545.

[3] Moliere *v.* Pennsylvania Fire Ins. Co. 5 Rawle, (Penn.) R. 342.

[4] See 1 Phill. on Ins. 52.

nor, subject to those exceptions, can any previous letters or communications between them, nor even the written application or agreement, be used to vary or control its interpretation." [1] "Although policies of insurance," says Mr. Chief Justice Parker, "are not technically specialties, not being under seal, they have nevertheless ever been deemed instruments of a solemn nature, and subject to most of the rules of evidence, which govern in the case of specialties. The policy itself, is considered to be the contract between the parties; and whatever proposals are made, or conversations had between the parties, prior to the subscription, they are to be considered as waived, if not inserted in the policy, or contained in a memorandum annexed to it." [2]

§ 22. But if from *mistake*, the policy has been so framed,

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[1] 1 Duer on Ins. § 16, and note, p. 132.

[2] Higginson *v.* Dale, 13 Mass. R. 99; and see New York Ins. Co. *v.* Thomas, 3 Johns. (N. Y.) Cases, 1; Phœnix Fire Ins. Co. *v.* Gurnee, 1 Paige, (N. Y.) Ch. R. 278; Van Ness *v.* The United States, 4 Peters, (U. S.) R. 286. In a case in the Superior Court of the City of New York, the defendants by a policy bearing date the 12th of May, 1826, insured the plaintiff to the amount of $5000, for seven years, on "*fixtures*" placed or to be placed in certain buildings. By *another* policy dated the 2d of December, 1825, the defendants had insured the plaintiffs to the amount of $2000, on "*gasometers* placed, or to be placed, in the city of New York, for three years." At the date of the first policy, the plaintiffs had placed gasometers to the amount of $2000, — but at its *expiration*, the amount had been increased to $20,000. When the policy on the "fixtures" was made, *their* value was estimated at $5000, — but this amount was afterwards increased to $100,000 and upwards. The gasometers and fixtures were subsequently injured by fire to the amount of $2500, a *part* of which was upon the gasometers and fixtures placed at the *date* of the policies, and a part upon those which were established afterwards. It was held, that by the true construction of the policies, they covered *all* "fixtures" to the amount of $3000, whether erected before or after the date of the policies; and that parol evidence was inadmissible to prove a verbal representation made by an agent, at the time the policies were effected, as to the value of the fixtures intended to be placed by the plaintiffs. New York Gas-Light Co. *v.* Mechanics Fire Ins. Co. 2 Hall, (N. Y.) R. 108.

that it does not correspond with the original agreement of the parties, the error may be corrected in a Court of Equity. This court may, if the policy be not filled up according to the intention of the parties, through inadvertence or mistake, upon *clear* and *positive* evidence of such inadvertence or mistake, correct the policy.[1] Mr. Justice Story remarks, — "There cannot, at the present day, be any serious doubt that a Court of Equity has authority to *reform a contract*, where there has been an omission of a material stipulation by mistake; and a policy of insurance is just as much within the reach of the principle, as any other written contract.[2] But a Court of Equity ought to be extremely cautious in the exercise of such an authority, seeing that it trenches upon one of the most salutary rules of evidence, that parol evidence ought not to be admitted to vary a written instrument. It ought, therefore, in all cases to withhold its aid, where the mistake is not made out by the clearest evidence according to the understanding of both parties, and upon testimony entirely exact and satisfactory. There is less danger where the instrument is to be reformed by reference to a preliminary written contract, which it was designed to execute; but even here, there is abundant room for caution, since the parties may have varied their intentions, or the clause may not have been originally understood by either party, to go to the extent now required. And these considerations acquire additional force, where circumstances have occurred, in the intermediate time, which gave

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[1] Per Chancellor Walworth, in Drew *v.* Whetten, 8 Wend. (N. Y.) R. 166; Ewer *v.* Washington Ins. Co. 16 Pick. (Mass.) R. 503; and see note *d*, to New York Ins. Co. *v.* Thomas, *ubi sup.* and 1 Duer on Ins. 71–73.

[2] Graves *v.* Boston Marine Ins. Co. 2 Cranch, (U. S.) R. 418; Townsend *v.* Strangoon, 6 Vern. R. 328; Matteux *v.* London Assur. Co. 1 Atk. R. 545; Ramsbottom *v.* Gordon, 1 Ves. & Beames, R. 165; Watt *v.* Grove, 2 Sch. & Lef. R. 492; Gillespie *v.* Morn, 2 Johns. (N. Y.) Ch. R. 585; Hogan *v.* Delaware Ins. Co. Marsh. on Ins. (Condy's edit.) 345 [a] note; Lyman *v.* United Ins. Co. 2 Johns. (N. Y.) Ch. R. 630. Where the contract is "executed," the courts of Common Law will not, but Equity will, relieve in a clear case of mistake or surprise. Beaum. on Ins. 56.

an intense interest to the asserted mistake. Under these limitations the doctrine of Courts of Equity do not seem at variance with general convenience or justice."

§ 23. But although parol evidence is not admissible to *control* the meaning of a policy, or of any other written instrument,[1] yet it is admissible, as in cases of other mercantile instruments, to *explain* the *language* of the policy, with reference to the usual practice of trade.[2] If any terms used in policies of insurance have, by the known usage of trade, or by use and practice, as between the underwriter and the assured, acquired an appropriate sense, they are to be construed according to that sense.[3] Thus, the word "freight,"[4] may mean goods on board a vessel, or the price to be paid for their carriage;[5] and thus parol evidence is admissible to show, that by the general usage, among merchants and underwriters in New York, the word "roots," first inserted in the New York policies, is confined to such roots as are perishable in their own nature; and that "sarsaparilla" is not a "root" perishable in its nature, or included under that term, in the memorandum in the policy.[6] So where one of the subjects of a charter-party was "cotton in bales," parol evidence of the mercantile use and meaning

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[1] Andrews *v.* Essex Fire and Marine Insurance Co. 3 Mason, (Cir. Co.) R. 6; see Henkle *v.* Royal Exchange Assur. Co. 3 Vern. R. 317.

[2] See Smith, Mer. Law, 394.

[3] For example, to show, that the Gulf of Finland is considered by mercantile men part of the Baltic. Uhde *v.* Walter, 3 Campb. R. 163. Goods insured "until they arrived at Leghorn," were landed at the Lazaretto, about half a mile from the city of Leghorn, as was customary in regard to goods of the kind insured, where a loss happened upon them, before the period of quarantine had expired, Marshall, Ch. J., said,—"Had the parties intended to continue the risk during the continuance of the goods in the Lazaretto, they would have inserted in the policy words manifesting that intention." Gracie *v.* Marine Ins. Co. 8 Cranch, (U. S.) R. 75.

[4] 1 Duer, 167.

[5] 1 Greenl. Ev. § 292.

[6] Coit *v.* Commercial Ins. Co. 7 Johns. (N. Y.) R. 3851.

of this term was held admissible.[1] A question arose under an agreement, that the underwriter should not be liable, upon a policy of marine insurance, for a partial loss on *corn*, whether *rice* was comprehended in that term, and Sir James Mansfield said, that no one reading the policy would be apprised that rice was intended; yet if a clear usage to the contrary were shown, *rice* might be considered comprehended in the word *corn*.[2]

§ 24. The practice and usage of other insurance companies restricting their liability to losses occasioned by actual burning by lightning, may be resorted to, to show that the general usage is in regard to losses or damage caused by lightning.[3]

§ 25. But though usage may be admissible to explain what is doubtful, it is not admissible to contradict what is plain.[4] Thus, where a policy was made, in the usual form, upon a ship, her tackle, apparel, boats, &c., evidence of usage, that the underwriters never pay for the loss of boats slung upon the quarter, outside of the ship, was held inadmissible. Parol evidence was also held to be inadmissble to prove that the words "glass ware in casks," in the memorandum of excepted articles in a fire policy, according to the common understanding of insurers and the assured, were meant such ware in open casks only.[5] In a case of a libel *in rem*, upon a bill of lading containing the usual clause, "the dangers of the seas only excepted," where it was articulated in the answer, that there was an established usage, in the trade in question, that the ship-owners should see the merchandise properly secured and

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[1] Taylor *v.* Briggs, 2 C. & Payne, R. 525; and see Gray *v.* Harper, 1 Story, (Cir. Co.) R. 574.

[2] Scott *v.* Bourdillon, 3 B. & Pull. R. 213.

[3] Babcock *v.* Montgomery County Mutual Ins. Co. 6 Barb. (N. Y.) Sup. Ct. R. 637; and see *post*, Chap. V.

[4] Brackett *v.* Royal Exchange Ins. Co. 2 Cr. & J. R. 244.

[5] Bend *v.* Georgia Ins. Co., Sup. Ct. N. Y. 1042, cited in 1 Greenl. Ev. § 292.

stowed, and that this being done, they should not be liable for any damages not occasioned by their own neglect; it was held, that this article was incompetent in point of law, to be admitted to proof.[1] In delivering the opinion of the court in this case, Mr. Justice Story took occasion to say — "I rejoice to find, that of late years, the courts of law both in England and America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them. The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the meaning of a particular word, or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend, that it never can be proper to resort to any usage or custom, to control or vary the positive stipulations in a written contract, and, *â fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate declaration of the parties." [2]

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[1] Schooner Reeside (case of) 2 Sumn. (Cir. Co.) R. 567.

[2] See Park on Ins. ch. 2, p. 30 – 60; Rankin *v.* Rankin, 1 Hall, (N. Y.) R. 619; Frith *v.* Barker, 2 Johns. (N. Y.) R. 335. *Foreign* words, when such happen to be used, or words purely technical, of which the legal import has not been fixed, must, of necessity, be translated, or explained by evidence,

§ 26. The true test of usage, say the Supreme Court of New York,[1] is "its having existed a sufficient length of time to have become generally known." So, according to Mr. Justice Story,[2] to make usage obligatory, it should be well settled, that persons engaged in trade must be considered as contracting in reference to it; but local customs are not to prevail over general law. The Supreme Court of Massachusetts have held, that "the usage of no class of citizens could be sustained in opposition to the principles of law;" the question being whether a policy of marine insurance should conform to a usage in Boston where it was effected.[3] Evidence as to a usage existing in New York, that, upon the occurring of any circumstance, whereby the risk is increased by the act of the assured, after the effecting of a fire insurance, notice thereof shall be given to the insurers, so that they may have the option of continuing the policy, or annulling it, cannot be received to alter the legal effect or operation of the contract.[4] A policy of insurance against fire upon a vessel building in the port of Baltimore, and for a specified period, is not controlled in its operation by proof of usage in other parts of the United States.[5]

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to enable the court to give them any effect. 1 Duer, 175; Sleight *v.* Hartshorn, 1 Johns. (N. Y.) R. 531. In reference to the views of Mr. Justice Story, as given above, Mr. Justice Sandford remarks: "Without fully concurring in the very strong and pointed language of the late Judge Story, against the indiscriminate resort to testimony of usages and customs of trade to control the construction and the results of contracts; we are free to say that we agree with him in a desire to restrict them to more exact and better defined limits. And we shall be inclined to adopt his caution and reluctance in their admission, as we regard a resort to them as liable to dangerous abuses in the interpretation of agreements." Hone *v.* Mutual Safety Insurance Co. 1 Sand. (N. Y.) Sup. Ct. R. 152.

1 Smith *v.* Wright, Caines, (N. Y.) R. 45.

2 Trott *v.* Wood, 1 Gallis. (Cir. Ct.) R. 444.

3 Homer *v.* Dorr, 10 Mass. R. 26.

4 Stebbens *v.* Globe Ins. Co. 2 Hall, (N. Y.) R. 632.

5 Mason *v.* Franklin Fire Ins. Co. 12 G. & Johns, (Md.) R. 468.

§ 27. The premium is usually paid in advance, and without the intervention of a *broker*. In marine insurance a broker is employed either directly by the owner of the ship or goods designed to be protected, or by a third person acting mediately as *agent* for the person beneficially interested, and invested with express or implied authority.[1] In respect to fire insurance, and in mercantile transactions, one of the most important duties which the safety of merchandise requires in agents or assignees, is that of protecting it by insurance;[2] and where the course of dealing between the principal and agent is such that the latter has been used to effect insurances, by directions of the former, the agent is bound to comply with an order to insure, although he has no effects in hand at the time of receiving the order.[3]

§ 28. The insurers, after reciting the receipt of the premium, usually covenant and agree, or undertake, that from the day named in the policy unto and inclusive of another day named in the policy, and so long as the assured shall pay the premium agreed upon, and the insurers shall accept the same, the stock and funds (of the company) shall be liable to make good any such loss or damage as shall happen by fire; with the exception of loss or damage by fire happening by any foreign enemy, civil commotion, or riot, or any military or usurped power, to the property specified.[4] By the general principles of insurance whenever the risk to be run is *entire*, there is no return of premium, though the contract should cease and determine the next day after its commencement.[5] This rule applies to insurances against fire, which generally are made for one entire and connected portion of time, which cannot be severed; and, therefore, if the property insured should be

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[1] Hughes on Ins. 92.

[2] Smith *v.* Lascelles, 2 T. R. 187; De Forest *v.* Fulton Fire Ins. Co. 1 Hall, (N. Y.) R. 110.

[3] Paley on Agency, 18; Story on Agency, § 190.

[4] Ellis on Ins. 1.

[5] 2 Marsh. on Ins. 652; 3 Kent, Comm. 341.

destroyed by fire, arising from the act of a *foreign enemy*, the very day after the commencement of the policy, though the underwriters would be discharged, yet there can be no apportionment or return of premium.[1]

§ 29. Where there is fraud on the part of the insurers, who privately know circumstances which render the contract a nullity, as where in marine insurance, the underwriters know of the arrival in port of the ship which it is proposed to insure, the premium can be recovered from them.[2] Lord Mansfield has observed, — "The underwriter receives a premium for running the risk of indemnifying the insured, and, whatever cause it be owing to, if he does not run the risk, the consideration, for which the premium or money, was put into his hands, fails, and, therefore, he ought to return it."[3] But where the right is equal, the claim of the party in actual possession shall prevail — *melior est conditio possidentis*;[4] and hence, when the contract is void for illegality, the premium cannot be recovered back.[5]

§ 30. It is very important to the assured, that they should have a clear right of action against the parties subscribing or executing the policy, to the extent of the funds of the society. That right should not be confined to a mere *order* for payment to be made by the subscribing directors upon the general body of the directors of the company; for an action in such case will not lie against the parties *executing* or the directors

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1 Ellis on Ins. 23.

2 Beaum. on Ins. 32; Carter *v.* Boehm, 3 Burr. R. 1909.

3 Stevenson *v.* Snow, 3 Burr. R. 1237.

4 Plowd. 296; Lowry *v.* Bourdieu, Doug. R. 468. The holder of a policy of insurance, with whom it has been deposited as security, has a lien on it at law; and if he receives the proceeds, has the right to retain them against one whose equity is not better than his own. Wells *v.* Archer, 10 S. & Rawle, (Penn.) R. 412.

5 Hanson *v.* Hancock, 8 T. R. 575, (a case of bets on a horse-race); Browning *v.* Morris, Cowp. R. 790, (a case of insurance on lotteries.)

generally. In a case which came before the Court of King's Bench,[1] on an issue directed by the Lord Chancellor, it was decided, that no contract could be enforced by action at common law where the policy ran as follows: "We the trustees and directors of the said society, whose names are hereunto subscribed, do *order, direct, and appoint the directors for the time being* of the society to raise and pay by and out of the moneys, securities, and effects of the said contributionship, pursuant and according to certain deeds, &c." It will be observed, that here the subscribing parties to the policy do not promise to pay, but their successors shall pay; and this, therefore, is a void contract as to the subscribing parties. And, on the principle, that if the ancestor is not bound, the heir, though named, is not bound;[2] and also because the future directors were not parties to the instrument, they are not bound.[3] This case was cited as an authority in another case,[4] which was an action of covenant on a policy of insurance, executed by the defendants under seal, to indemnify the plaintiffs against a loss by fire. The directors, subscribing the policy, "declared" that the sum should be paid out of the funds of the society; and this was held sufficient to support an action on the *assumpsit.* This case is mainly distinguishable from the former one as in that case the defendants were not parties to it, they having

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[1] Alchorne *v.* Saville, 6 Moore, R. 202, n.

[2] If a man bind his heir to pay 20*l.* every year, but do not bind himself, he shall not be bound. See Barber *v.* Cox, 2 Saund. R. 37; A. — Coke, Litt. 384.

[3] "Perhaps," says Beaumont, (on Ins. p. 10, *note* u.) "it might have been contended, that the word 'direct' has a technical meaning, which would give effect to the intention of the instrument. The parties being 'directors' do 'direct;' that is do undertake all which by their office they are empowered to do respecting the insurance or payment of money in case of loss; such an implied assumpsit seems warranted. But if there is no ground of action in the policy against the subscribing directors, then perhaps the assumpsit would lie against the succeeding directors who had accepted the premiums in succeeding years, as each renewal of the policy might for this purpose be considered a separate assumpsit."

[4] Andrews *v.* Ellison, 6 Moore, R. 199.

only ordered the directors of the society for the time being to do particular things, namely, to raise and pay out of the moneys and securities of the contributionship according to certain deeds and settlements; and the Court of King's Bench decided, that they were not personally liable, as it was not their deed, and as they merely appointed other persons to pay a loss in case it should happen, out of the funds of the society. In the last case, the defendants covenanted to pay, if the funds of the society would be adequate.[1]

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[1] See Ellis, p. 2 – 10.

CHAPTER III.

OF THE CONSUMMATION AND DURATION OF THE CONTRACT OF FIRE INSURANCE.

§ 31. When a policy of fire insurance has in fact been executed, and notice of the execution has been given to the assured, its actual delivery is not essential to the completion of the contract. The insurer, whether an individual, or an incorporated company, would not be allowed to retract a consent thus confessed to have been given; but would be considered as holding the policy for the benefit of the insured, and bound to deliver it at his request. Should a loss occur and the policy then be withheld from the assured, it would not be necessary for him to seek the aid of a Court of Equity, as he would have a complete remedy in an action at Law.[1] A policy, under such circumstances, becomes in fact the property of the assured, and if withheld, an action of *trover* will lie against the insurer.[2]

§ 32. But the question may arise, in a given case, whether the policy has been executed, or whether the agreement for the insurance is inchoate only. Such a question has arisen in a case in which the action was an action of trover for the recovery of a policy of insurance. It appeared in evidence, that the plaintiff had directed his agent to effect an insurance on goods on board a ship. The agent applied to the president of the insurance company, on the 12th of October, and settled

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[1] The doctrine is thus clearly and correctly stated in the exact words of Mr. Duer. 1 Duer on Ins. p. 66, § 10.

[2] Park on Ins. 4; 1 Marsh. on Ins. 303.

with him the terms of the insurance, but *left the office before the policy was filled up.* It was, however, filled up and executed a few hours afterwards, of which the president of the company gave notice, mentioning, at the same time, that the company had received information that the vessel had been captured and carried into Halifax. This information appeared in a newspaper published on the very day the insurance was made; but was not known to either party when the agreement was entered into, and the policy executed. On a subsequent day the agent called to deliver the premium and to receive the policy; but the company refused to deliver to him. One of the objections to the recovery of the plaintiff, was that the agreement for the insurance was inchoate, and that the company, having heard of the loss before the delivery of the policy, had a right to retract. But Mr. Justice Washington, in his charge to the jury, considered the objection as entitled to no weight; there was no charge of unfairness, he told them, on the part of the agent. It is not pretended he knew of the loss when he waited on the president and settled with him the terms of the contract. Every thing was then agreed on, and although he did not wait to receive the policy, yet immediately after he left the office, it was filled up and signed by the president, and had been produced on the trial. The contract, therefore, was not inchoate, but perfected before notice of the capture by either of the parties.[1]

§ 33. In commercial towns, actions on mere agreements to insure, whether against fire or perils of the sea, are not uncommon; and they are always sustained whenever it appears that the terms of the agreement have been fully settled by the concurrent assent of the parties, so that nothing remains to be done, but to deliver the policy.[2] The contract is executory in the first instance, and completed when the policy is

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[1] Kohne *v.* Ins. Co. of North America, 1 Wash. (Cir. Co.) R. 93.

[2] Per Gibson, C. J., in Hamilton *v.* Lycoming Ins. Co. 5 Barr, (Penn.) R. 339; Andrews *v.* Essex Fire and Marine Ins. Co. 3 Mason's (Cir. Co.) R. 6.

drawn up.[1] Mere receipts for premiums are very common in the city of New York, and much insurance is effected, in the first instance, by means of such receipts. The design of them is to give *immediate effect* to the insurance, or to supply the place of a formal policy until one can be prepared. A receipt of this sort is signed by the president or secretary of the company; and it constitutes, in equity, a valid insurance,[2] and in law, a valid agreement to insure.[3]

§ 34. When the negotiation for insurance is so far completed, that nothing remains to be done but to deliver the policy corresponding with the terms and date of the application, should a loss occur before the execution of a policy, a Court of Equity would relieve the assured; and upon a bill properly framed, instead of confining itself to a specific execution of the agreement to insure, would probably decree the payment of the loss.[4] Such was the relief given by Lord Hardwicke,[5] on a bill to correct a mistake in the policy, and in principle, there seems to be no distinction between the cases.[6]

§ 35. In the case of Perkins *v.* Washington Insurance Com-

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[1] Pim *v.* Reid, 1 Man. & Grang. R. 1.

[2] It is a well-settled principle in the Court of Chancery, that whatever a person is legally bound to do, shall be considered as done, as to all persons having a right to claim its performance. Perkins *v.* Washington Ins. Co. 4 Cow. (N. Y.) R. 645. It would be unconscionable, when the terms of a contract of insurance have been matured, for the underwriter to insist upon his own omission to execute the policy. Hamilton *v.* Lycoming Ins. Co. 5 Barr, (Penn.) R. 339.

[3] Carpenter *v.* Mutual Safety Ins. Co. 4 Sand. (N. Y.) Ch. R. 408; Lightbody *v.* North American Fire Ins. Co. 23 Wend. (N. Y.) R. 18.

[4] 1 Duer on Ins. p. 66, § 10; Andrews *v.* Essex Fire Ins. Co. 3 Mason, (Cir. Co.) R. 6.

[5] Motteaux *v.* London Assurance Co. 1 Atk. R. 545. And see Taylor *v.* Merchants Fire Ins. Co. 9 How. (U. S.) R. 399, 405; Carpenter *v.* Mutual Safety Ins. Co. 4 Sand. (N. Y.) Ch. R. 408.

[6] 1 Duer, *ubi sup.*

pany,[1] the bill was filed to compel the defendants to execute a policy against fire, in conformity to an *agreement to insure*, made by their agent, or pay the loss; and the Court of Errors of the State of New York, on the reversal of the decree of the Chancellor, decreed, not that a policy should be executed, but that it should be referred to a Master to ascertain and report the amount due for the loss, and that a decree for its payment should be entered upon the *confirmation* of the Master's report. There was no dispute, however, in this case as to the fact of a loss, or as to the liability of the company for its payment, upon the supposition that they were bound by the agreement of the agent. This case has been considered a direct authority in support of the position, before stated, that a Court of Equity, upon a bill for the specific execution of an agreement to insure, may decree a satisfaction.[2]

§ 36. Bronson, J., in delivering the opinion of the court in Lightbody *v.* The North American Insurance Company,[3] expressed his opinion, that an *action on the case* might be maintained for a refusal to deliver a policy to which the plaintiff became entitled by an agreement for one.

§ 37. It appears, too, by a case in Massachusetts, that the assured, upon a consummated agreement to insure, has a remedy in an *action at law*. The action, in the case referred to,[4] was founded on an alleged agreement contained in the correspondence of the parties; and the Court, although they were of opinion, that the letters did not afford sufficient evidence of a contract

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[1] Perkins *v.* Washington Ins. Co. 4 Cow. (N. Y.) 646.

[2] 1 Duer on Ins. p. 111, Note, VII.

[3] Lightbody *v.* North American Ins. Co. 23 Wend. (N. Y.) R. 18, 25. Insurers, on receiving a premium, agreed in their receipt to deliver a policy covering specific property, and afterwards sent a policy varying from the terms of the contract, and a loss occurred within the insurance contracted for. It was held, that the assured might recover according to the contract agreed on. Franklin Ins. Co. *v.* Hewitt, 3 B. Mon. (Ken.) R. 231.

[4] McCulloch *v.* Eagle Ins. Co. 1 Pick. (Mass.) R. 278.

binding on the defendants, yet they held, that had such a contract been made, the mere want of a policy would not prevent the plaintiff from recovering. The form of the action in this case, was *assumpsit*, treating the agreement to insure as an actual insurance; but it seems to be necessary, that the action should be special, stating as a breach, the refusal of the defendants to deliver the policy, according to the agreement, setting forth the terms of the policy that ought to have been made, showing that the loss claimed would have been recoverable under it, and alleging as a special damage that the plaintiff had been deprived of the remedy it would have given. And to entitle the plaintiff to recover, the plaintiff would be bound to give the same evidence as if the action had been founded on the policy itself — evidence of a compliance, on his part, with all the conditions that the policy, if executed, would have imposed.[1]

§ 38. Of course it would be an objection to the validity of a policy founded on a previous agreement, that the loss at the time was known to the assured *only;* but no case has determined that an underwriter who effects a policy with a full knowledge that a loss has actually happened, may not be bound by it; on the contrary, it has been otherwise determined. In a case in the Court of King's Bench, Mead *v.* Davison,[2] the material question was whether an assured could recover on a policy executed after the loss had occurred, and became known

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[1] Lord Mansfield would have considered the defendants, were the agreement proved, as the actual insurers, and the plaintiff must have proved his loss and interest. Harding *v.* Carter, Park on Ins. (3d ed.) 4. Where a bill in Chancery was filed to compel an insurance company to issue a policy upon a contract previously made, such bill cannot be sustained, unless there is conclusive proof that such contract was actually made; if the matter is left in doubt, upon the whole evidence the bill must be dismissed. Suydam *v.* Columbus Ins. Co. 18 Ohio, R. 459.

[2] Mead *v.* Davison, 3 Adol. & Ell. R. 303. There is considerable analogy, Lord C. J. Denman thought, between this case and Paine *v.* Meller, 6 Ves. R. 349.

to *both parties.* The policy in question, was on a ship, lost or not lost; the ship had been accepted for insurance, and the premium paid, before loss; although the policy was not actually executed till the loss had happened, and both the insurer and the assured knew it; and it was held that the policy was good. Lord C. J. Denman said, — "His (the underwriter's) conduct might indeed appear extraordinary, if it were not clear that he had a good legal consideration for entering into the contract, namely, the payment of the premium, which may be regarded as a price actually given and received for the underwriter's indemnity against the contingency that has arisen."

§ 39. It is by no means requisite to the validity of an agreement to insure, that it should be contained in a special writing, signed by the parties; and it may, and is, frequently concluded by a *correspondence* between parties residing in different places. The question is, when a negotiation carried on in this mode, becomes perfect, and the parties become mutually bound to each other. The rules applicable, not alone to the contract of insurance, but to all other contracts, alleged to have been made by an offer from the one party and its acceptance by the other, have been thus perspicuously laid down by Mr. Justice Washington:[1] "It is an undeniable principle, that an offer of a bargain by one person to another, imposes no obligation upon the former, until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the person who made it. Until the terms

[1] Eliason *v.* Henshaw, 4 Wheat. (U. S.) R. 228. It is necessary to look closely into the correspondence between the parties, and see if from that, the evidence of the assent of both parties to the terms of the agreement be clear and unequivocal. Neville *v.* Merchants and Manufacturers Ins. Co. 19 Ohio, R. 452. In this case, it was held, that an insurance company cannot be held liable in chancery to issue a policy of insurance in pursuance of an alleged contract, unless the proof is clear, that such contract has been consummated

of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either." In the application of the law as thus generally laid down, it was adjudged by the court, in the case referred to, that an offer to purchase flour, accompanied with a request to write an answer to be delivered at Harper's Ferry, was not accepted, so as to create an obligation, by writing a letter agreeing to the propositions directed to Georgetown, where the defendant received it. The reason assigned was, that the plaintiff in error had a right to dictate the terms on which the flour would be received.

§ 40. The assent of underwriters, therefore, in the words of Mr. Duer,[1] to any modifications to the terms proposed by them, "generally speaking must be established by the same evidence as their original offer, although, under special circumstances, as when the applicant has transmitted a note for the premium, the silence of the underwriters, in their omission to inform him in due season of their dissent, and to return the premium note, might justly be held to conclude them." In the case of the Ocean Insurance Company *v.* Carrington,[2] the action was brought for the recovery of a premium note given by the defendant, on a policy executed by the company, and the question was, whether the policy corresponded with the previous agreement, so that the defendant was bound to accept it. It appeared, that Carrington wrote to the company to inquire upon what terms they would make an insurance "on twenty-six horses and twenty oxen, on board the brig Gleaner, from Saybrook to the West Indies," saying nothing as to the valuation of the property, or the sum he desired to be insured. The company replied in these words, — "The office will take the risk at fifteen per cent., or at ten per cent. with a warranty that the property was safe on the 7th of December last, but no partial loss is to be paid under ten

[1] 1 Duer on Ins. 67.

[2] Ocean Ins. Co. *v.* Carrington, 3 Conn. R. 357.

per cent." By the mail of the next day Carrington replied: "We accept your terms with a policy filled, on twenty-six horses valued at $2,200, and on twenty oxen, valued at $800," and in this letter inclosed the premium note. The company, on the following day, forwarded by mail a policy "for $3,000 on stock, on the deck of the brig Gleaner," with this note in the margin, forty-six head of horses and oxen, valued at $3,000." This policy, the defendant refused to accept, and immediately returned it to the company. The ground of this refusal was, that the horses and oxen were included in one *gross valuation*, instead of being *separately* valued, according to the terms in which he had accepted the offer. In delivering the judgment of the court, and commenting on the defendant's second letter, Chief Justice Hosmer said, — "This was a *new* proposal, which Carrington might presume the company would accept, but could not know it. The office had assumed no such obligation, as the office had not agreed to underwrite a valued policy; neither had the defendant agreed to receive an open policy. The minds of the parties had not met. It would be plainly an unjustifiable stress upon the first words of the letter 'we accept,' to consider this expression as concluding the contract. The underwriters, by the valued policy which they transmitted, recognized the new proposal in part, and if they had attended to their import, the same words would have convinced them that a separate valuation of the horses and oxen was proposed. The policy transmitted was not conformable to the proposition. The parties never did agree." Bristol, J., dissented from the other judges; he did not question the principle of their decision, but only adopted a different interpretation of the defendant's second letter.[1]

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[1] Bristol, J., said — "Have the defendants got the policy, which they contracted for, and which the plaintiffs were bound to furnish? It is claimed by the defendants that horses were to be separately insured; and the oxen were likewise to be separately insured; so that in case of a loss amounting to ten per cent. on the value of either, the assured would be entitled to recover of the insurers; whereas, upon the policy in question, a loss equal

§ 41. It thus appears, that, in order to complete a contract of insurance, the minds of the two parties, (in the words of Chief Justice Hosmer) must "have met,"[1] (*aggregatio mentium*); and therefore, an offer by one person to another by a letter applying for insurance, imposes no obligation upon him who makes it, until it is accepted by the latter. In cases then of correspondence by letter, it is, and has hitherto been made, an important question, in what stage of such correspondence is this *aggregatio mentium*, or mutual consent, so requisite to the creation of a perfect contract, in the eye of the law, consummated. The Supreme Court of Massachusetts have decided, that where an insurer has offered by letter to insure upon certain terms, the agreement is not consummated by the mere acceptance of the terms by the party to whom they are proposed, but that the insurer is at liberty to retract his offer at any time before notice of its acceptance has been received by him. The decision was made in the case of McCulloch *v.* The Eagle Insurance Company;[2] A. wrote to B. by mail, to inquire on what terms he would insure a vessel; B. wrote an answer on the 1st of January, that he would insure at a certain rate; on the 2d of January, he wrote another letter,

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to ten per cent. on the entire valuation of both horses and oxen must be sustained, in order to authorize a recovery. The question, then, is resolved into this: Did the company agree to take a separate risk upon the horses, and another upon the oxen? Or, was the agreement to take *one* risk on both horses and oxen, as a single indivisible subject of insurance? In my opinion, the latter was clearly the contract between the parties; and had not intelligence of the safety of the vessel reached the defendants between the time when they inclosed by mail their premium note and the reception of the policy, this defence would never have been made. On the contrary, had intelligence of a loss reached the defendants, after they requested the policy to be made out, and before it was received, they would not only have been *able in law*, but also *willing in fact*, to enforce the policy against the insurers."

[1] Ocean Ins. Co. *v.* Carrington, *ubi sup.* And see Gray *v.* Foster, 10 Watts, (Tenn.) R. 280.

[2] McCulloch *v.* Eagle Ins. Co. 1 Pick. (Mass.) R. 278.

retracting; A., before he received the last letter, wrote by mail an answer to B.'s first letter, acceding to the terms; and it was held, that there was no contract, and that the treaty was open until B. had received the letter of A. Parker, C. J., in delivering the judgment of the court, observed, — "It is contended by the plaintiff, that the bargain was completed the moment he wrote and put into the mail his letter, signifying his acceptance of the terms offered; and by the defendants, that the bargain was open until they should have received that letter, and that in the mean time, they had a right to withdraw their offer. We adopt the latter opinion as the most reasonable. The offer did not bind the plaintiff until it was accepted, and it could not be accepted to the knowledge of the defendants, until the letter announcing the acceptance was received."

§ 42. The construction in the above case of McCulloch *v.* The Eagle Insurance Company, is far from having given general satisfaction.[1] Chancellor Kent is most explicit in dissenting

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[1] See 1 Duer on Ins. p. 67, § 13, and p. 117, Note IX. The Supreme Court of Massachusetts cited in support of their decision, Payne *v.* Cave, 3 T. R. 148, and Cooke *v.* Oxley, 3 T. R. 653. The first was in relation to a bidder at a public auction, and the decision was that he may retract his bid at any time before the hammer is struck upon his offer. It has never been doubted, as Mr. Duer says, that an offer to make a contract may be withdrawn, if before it is *accepted*, the withdrawal be made known to the party making the offer; but this by no means proves, that it may be withdrawn after he has decided to accept it. With regard to the case of Cooke *v.* Oxley, Chancellor Kent says, that the criticisms which have been made upon it are sufficient to destroy its authority. 2 Kent, Comm. 477, note *a*. The following is Mr. Duer's criticism: "It not only supports the doctrine of the Supreme Court of Massachusetts, but goes much further, for it decides, that when a bargain has been proposed and a certain time for closing it has been allowed, there is no contract even when the offer has not been withdrawn, and *has been accepted* within the limited period. To constitute a valid agreement, there must be proof that the party making the offer assented to its terms after it was accepted. But there is high authority, that of Mr. Justice Bayley, for saying, that this case is erroneously reported." See 1 Duer, Ins. p. 118, Note IX.; Humphries *v.* Carvalho, 16 East, R. 45.

from it. He says, — "In creating the contract, the negotiation may be conducted by letter, as is very common in mercantile transactions; and the contract is complete when the answer containing the acceptance of a distinct proposition is despatched *by mail*, or otherwise, provided it be done with due diligence after the receipt of the letter containing the proposal, and before any intimation is received that the offer is withdrawn." [1] In corroboration of this construction of the law of contracts, this highly distinguished author and celebrated jurist relies upon the decision in the case in the King's Bench, of Adams *v.* Lindsell.[2] The action, in that case, was for non-delivery of wool, according to agreement. The defendants, by letter, offered to sell to the plaintiff a certain quantity of wool at a specified price, and on specified terms of payment, stating that they expected an answer by the course of *the post*, but, by mistake, directed their letter to the wrong county; and, in consequence of this mistake, not receiving an answer as soon as they expected, they, in the interval, sold the wool. The plaintiffs, however, accepted the offer as soon as they received the letter containing it, and wrote an answer, by the post, of the same day, which was received by the defendants the day after the sale. The judge, on the trial, held that the delay having been occasioned by the neglect of the defendants, the jury were bound to consider that the answer did arrive by due course of post, and, that the defendants were, therefore, liable for the loss the plaintiffs had sustained by the sale. On a motion for a new trial, the counsel for the defendants, upon the authority of Payne *v.* Cave,[3] and Cooke *v.* Oxley,[4] insisted, that until the answer was received, by due course of post, there was no binding contract between the parties, but until then, the defendants had a right to retract their offer, as they had done, by a sale to other persons. The Court, however, *dis-*

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[1] 2 Kent, Comm. 477.

[2] Adams *v.* Lindsell, 1 Barn. & Ald. 681.

[3] See *ante*, § 42, note.

[4] Ibid.

regarding the authorities cited, said, that if such were the law, no contract could ever be completed by the post, for if the defendants were not bound by their offer, *when accepted by the plaintiffs*, until the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it, and so it might go on *ad infinitum*. The defendants must be considered, in law, as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter.[1]

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[1] Pothier says, (*Traité du Contrat du Vente*, p. 1, § 2, art. 3, no. 32,) that "If I have written to a merchant in Leghorn, proposing to purchase from him a certain quantity of goods, of a specified price, and before that letter has been received by him, should write him a second, retracting my offer, or before that time should die, or lose my reason, although the merchant, on receiving my first letter, should accept the offer it contained, in ignorance of the change of my will, death, or loss of reason, there would be no contract between us: for, as my will, as expressed in my offer, did not remain unchanged to the very period of its acceptance by my correspondence, there was no such mutual consent, no such concurrence of our wills, as was necessary to complete the contract." "It must be confessed," says Mr. Duer, "that the case thus stated by Pothier, while it fully supports the decision of the Supreme Court of Massachusetts, is wholly irreconcilable with that of the King's Bench. The alteration in will in the person who has proposed to sell goods to another, is as certainly manifested by his sale of the goods to a third person, as by an express letter of revocation, and where both acts are equally unknown to the party accepting, no reason can be assigned why they should be differently construed. Such a revocation is of no other use or importance than as evidence of a change of intention; and the same evidence is furnished by the sale. Pothier, however, adds certain modifications, by which the apparent injustice of the rule that he adopts, is greatly diminished, if not wholly removed. When a person who has accepted an offer secretly revoked, sustains any injury or loss from his reliance on the execution of the contract, he is entitled to a full indemnity." It is evident, Mr. Duer is of opinion, that the difference between the Civil Law, as interpreted and qualified by Pothier, and that adopted by the King's Bench, in Adams *v.* Lindsell, is, in a great measure, nominal. See Duer on Ins. p. 128, 129; and Chiles *v.* Nelson, 7 Dana, (Ken.) R. 281.

§ 43. In relation to the two important and conflicting cases of McCulloch *v.* The Eagle Insurance Company, in the Supreme Court of Massachusetts, and of Adams *v.* Lindsell in the King's Bench, we quote some very appropriate remarks which have a claim to attention, made by Mr. Justice Marcy, in the Court of Errors of New York,[1] — "The case of Adams *v.* Lindsell, proceeds upon, and affirms, the principle, that the willingness to contract, thus manifested, is presumed to continue for the time limited, and, if that be not indicated by the offer, until it is expressly revoked or countervailed by a contrary presumption. In that case, it was said, 'the defendants must be considered in law as making, during every instant of time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is complete, by the acceptance of it by the latter.' Against the authority of the case of Adams *v.* Lindsell, we have urged on us a decision of a court of the highest respectability, in one of our sister States. The case of McCulloch *v.* The Eagle Insurance Company, conflicts in principle, according to my views of it, with the case decided by the King's Bench. I should have been pleased to see these tribunals harmonize upon a question of no small importance to the commercial world; and I have, therefore, deliberately weighed the ingenious attempts made to reconcile these decisions upon this point; but these attempts appear to me to have been unsuccessful. A refinement which would distinguish between a contract of insurance and one for the sale of goods, in relation to the assent of the parties, might relieve us from the embarrassment which the different principles of these decisions is calculated to produce; but to apply such a distinction hereafter would doubtless involve courts in a still more distressing embarrassment. Distinctions which are not founded on a difference in the nature of things, are not entitled to indulgence; they tend to make the science of law a collection of arbitrary rules, appealing to factitious reasons

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[1] In Mactier *v.* Frith, 6 Wend. (N. Y.) R. 115.

for their support, consequently, difficult to be acquired, and often of uncertain application. The two cases referred to should have applied to them the same rules of law, and we are required to say what that rule is." The learned judge then adverts to the general principles of law in respect to what makes a valid contract, and adds, — "Testing the rules of law laid down in the two cases to which I have referred, by the authority of reason, and the practical results that are likely to flow from them, it does appear to me, that we are not left at liberty to hesitate about the choice. If we are inclined, from the force of abstract reason, to prefer the rule laid down by the Court of King's Bench, that inclination will be greatly strengthened by a recurrence to the opinions of courts and jurists. The Common Pleas, in England, seems to me to have given their approval,[1] to the decision of Adams *v.* Lindsell."

§ 44. Again, the learned reporter of McCulloch *v.* Eagle Insurance Company, has attempted to distinguish it from Adams *v.* Lindsell, principally on the ground, that *a treaty respecting insurance is necessarily subject to contingencies while it is forming.* There is certainly no doubt of this fact. But the question, as C. J. Gibson has said, "remains; when is it entirely formed? Had their ship returned, says he, before the plaintiffs had answered, they would have been at liberty to decline the offer; but it follows not that they would have been at liberty to retract an actual acceptance before the defendant had received it." And the truth is, this learned judge adds, that this case, and Adams *v.* Lindsell, are not to be reconciled; and he regards the conclusion inevitable, that an actual concurrence of assent, at any particular moment, is the ruling circumstance, the time of communicating it being comparatively unimportant.[2]

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[1] Routledge *v.* Grant, 6 Bing. R. 653.

[2] Hamilton *v.* Lycoming Mutual Ins. Co. 3 Watts, (Penn.) R. 339. And see comments by Mr. Duer, 1 Duer on Ins. 11.

§ 45. In the case of Thayer *v.* Middlesex Insurance Company, in Massachusetts,[1] although the case of McCulloch *v.* Eagle Insurance Company was not overruled in express terms, yet the language of the Court, in the opinion of an eminent jurist,[2] involves a plain renunciation of the principle on which it was founded. The action was brought upon an alleged agreement to insure certain buildings against fire, and, upon the facts, which it is unnecessary to state, the court arrived at the conclusion, that the proposal of the defendants had not been acceded to by the plaintiff at the time the loss had occurred, and of course, that "there was no contract of insurance between the parties. Chief Justice Shaw, in delivering the opinion of the court, after observing, that an offer is not matured into a complete and effectual contract until it has been acceded to by the person to whom it is made, and notice thereof, either actual or constructive, given to the party making it, in a subsequent passage, says, — "It may well be conceded, that when notice is to be given by mail, a notice actually put into the mail, especially if forwarded and beyond the control or revocation of the party making it, may be good notice:" "evidently," says Mr. Duer,[3] "meaning, that a notice thus put into the mail, and beyond the control of the party, is valid as a constructive notice, so as to render the contract from that time complete and effectual; — a rule substantially agreeing with that stated in the text, (that of Adams *v.* Lindsell,) except that I conceive that an acceptance put into the mail, from that time perfects the contract, and that the mere possibility of its being withdrawn or revoked is not sufficient to impair its validity."

§ 46. The opposing cases of McCulloch *v.* Eagle Insurance Company, and Adams *v.* Lindsell, received the attention of Gibson, C. J., in the Supreme Court of Pennsylvania, in Ham-

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[1] Thayer *v.* Middlesex Ins. Co. 10 Pick. (Mass.) R. 332.

[2] 1 Duer on Ins. p. 121, Note IX.

[3] Ibid.

ilton *v.* Lycoming Mutual Insurance Company.[1] The facts were, —On the 22d of January, 1842, the plaintiff in error caused a survey to be made, by the agent of that company, of a building known as the Clinton Academy, and made a written application to the agent for an insurance. In this it was stated there was a flue in the house secured by a sheet-iron collar. On the same day he executed and delivered to the agent a premium note, promising to pay in such sums as the directors might, according to their charter, demand. On this note, the amount required to be paid in cash, together with the price of the policy, was paid, and the plaintiff received from the agent a certificate reciting the application, the note, and the payments thereon, and stating that $1,050 "will be insured on the property for five years from the date of the application, *if the company approve the said application.*" The papers were transmitted to the company, and laid before the executive committee, who did not approve of the application, nor issue a policy; but the secretary wrote to the agent, that the plaintiff must substitute an *earthen* collar for the *sheet-iron* one, and procure the assent or authority of the trustees of the building to his obtaining an insurance, *and when the company were duly certified that these requisites were complied with*, they would send him on the policy. This consent was obtained in writing, and the required alterations made. The plaintiff informed the agent of these facts, and requested him to call and see the written assent, and that the requirements had been complied with. This request was constantly repeated during the summer, but not complied with, owing to a press of private engagements. The building was destroyed by fire, in April, 1843. After this the agent wrote to the company, stating the circumstances, and that it was merely through his own neglect he had not called on the plaintiff, as requested, to see the alterations. The court held, (expressly recognizing the soundness of the decision in Adams *v.* Lindsell,) that the

[1] Hamilton *v.* Lycoming Mutual Ins. Co. 5 Barr, (Penn.) R. 339.

company were liable — there was an acceptance before any knowledge of a retraction.[1]

§ 47. The doctrine may be, therefore, considered to be well established, in this country, that the acceptance of a written proposal for insurance consummates the bargain, provided the offer is standing at the time of the acceptance. What shall constitute an acceptance, will depend, in a great measure, upon circumstances; but it is certain, that a mere determination of the mind, or of such determination without action, can never be an acceptance. Where the proposition is by letter, the usual mode of acceptance is the sending of a letter announcing a consent to accept; where it is made by a messenger, a determination to accept, returned through him or by another would seem to be all the law requires, if the contract may be consummated without writing. There are other modes which are equally conclusive on the parties: keeping silent, under certain circumstances, is an assent to a proposition; any thing that shall amount to a manifestation of a formed determination to accept, communicated or put in the proper way to be communicated to the party making the offer, would doubtless complete the contract; but a letter written would not be an acceptance, so long as it remained in the possession or under the control of the writer. An acceptance is the distinct act of one party to the contract, as much as the offer is of the other. Such is the exposition of Mr. Justice Marcy, and which had relation in particular to a case which presented the following facts: A joint owner of a cargo of brandy, ordered from France, and supposed to be on the sea, wrote from St. Domingo to his co-owner in New York on the 24th of December, proposing, that the latter should take the adventure *solely* on his own account; who, on the 17th of January, in answer to the

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[1] The nature of a conditional promise resting on an executory consideration, was explained, said Gibson, C. J., in Clark *v.* Russell, 3 Watts, (Penn.) R. 217; and it may be seen from it, that the plaintiff having actually performed what he had been requested to do, was entitled to have the policy.

proposition, said he would *delay coming to a determination* until he again heard from the party making the offer; and the owner in St. Domingo, on the 7th day of March, acknowledged the receipt of the answer, saying he had *noted* its contents, and, on the *twenty-eighth* day of March, by another letter, confirmed the offer made in December; and the owner in New York, on the *twenty-fifth* day of March, after the arrival of the brandy in port, wrote to the owner in St. Domingo, that he had decided to take the adventure to his own account, and had credited him with the invoice. It was held, that the offer to sell remained open, and that its acceptance on the 25th of March, closed the bargain, notwithstanding that the letters of the 25th and 28th of March did not reach the places of their direction until after the death of the party accepting, which happened on the 10th of April.[1]

§ 48. In Tayloe *v.* The Merchants Fire Insurance Company, in the Supreme Court of the United States, as lately as the January Term, 1850,[2] the case in the court below was this: "William H. Tayloe, of Richmond County, Virginia, applied to John Minor, the agent of the defendants, residing at Fredericksburg in that State, for an insurance upon his dwelling-house to the amount of $8,000 for one year, and, as he was about leaving home for the State of Alabama, desired the agent to make the application in his behalf. The application was made accordingly, under the date of 25th November, 1844, and an answer received from the secretary of the company, stating that the risk would be taken at seventy cents on the thousand dollars, the premium amounting to the sum of fifty-six dollars. The agent stated in the application to the company the reason why it had not been signed by Tayloe; that he had gone to the State of Alabama on business, and would not return till February following; and that he was desired to communicate to him at that place the answer of the

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[1] Mactier *v.* Frith, 6 Wend. (N. Y.) R. 103.

[2] Tayloe *v.* Merchants Fire Ins. Co. 9 How. (U. S.) R. 390.

company. On receiving the answer, the agent mailed a letter directed to Tayloe, under date of the 2d of December, advising him of the terms of the insurance, and adding, 'Should you desire to effect the insurance, send me your check payable to my order for $57, and the business is concluded.' The additional dollar was added for the policy. This letter, in consequence of a misdirection, did not reach Tayloe till the 20th of the month; who, on the next day, mailed a letter in answer to the agent, expressing his assent to the terms, and inclosing his check for the premium as requested. He also desired that the policy should be deposited in the bank for safe-keeping. This letter of acceptance was received on the 31st at Fredericksburg by the agent, who mailed a letter in answer the next day, communicating to Tayloe his refusal to carry into effect the insurance, on the ground that his acceptance came too late, the centre building of the dwelling-house in the mean time, on the 22d of the month, having been consumed by fire. The company, on being advised of the facts, confirmed the view taken of the case by their agent; and refused to issue the policy, or pay the loss. A bill was filed in the court below by the insured against the company, setting forth, substantially, the above facts, and praying that the defendants might be decreed to pay the loss, or for such other relief as the complainant might be entitled to. I. Several objections were taken to the right of the complainant to recover, which the court thought necessary to notice; but the principal one was, that the contract of insurance was not complete at the time the loss happened, and therefore, that the risk proposed to be assumed had never attached. Two positions were then taken by the counsel for the company for the purpose of establishing this ground of defence. 1. The want of notice to the agent of the company of the acceptance of the terms of the insurance; and, 2. The non-payment of the premium." The following is the opinion of the court, as delivered by Mr. Justice Nelson: "The first position assumes that, where the company have made an offer through the mail to insure upon certain terms, the agreement is not consummated by the

mere acceptance of the offer by the party to whom it is addressed; that the contract is still open and incomplete until the notice of acceptance is received; and that the company are at liberty to withdraw the offer at any time before the arrival of the notice; and this even without communicating notice of the withdrawal to the applicant; — in other words, that the assent of the company, express or implied, after the acceptance of the terms proposed by the insured, is essential to a consummation of the contract. The effect of this construction is, to leave the property of the insured uncovered until his acceptance of the offer has reached the company, and has received their assent; for, if the contract is incomplete until notice of the acceptance, till then the company may retract the offer, as neither party is bound until the negotiation has resulted in a complete bargain between the parties. In our apprehension, this view of the transaction is not in accordance with the usages and practice of these companies in taking risks; nor with the understanding of merchants and other business men dealing with them; nor with the principles of law, settled in analogous cases, governing contracts entered into by correspondence between parties residing at a distance. On the contrary, we are of opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed, a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and that it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted. This view of the effect of the correspondence seems to us to be but carrying out the intent of the parties, as plainly manifested by their acts and declarations. On the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has a right to

regard it as intended as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected. Such is the plain import of the offer. And besides, upon any other view, the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be, in turn, proposed by the applicant to the company for their approval or rejection. For, if the contract is still open until the company is advised of an acceptance, it follows, of course, that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance. It is apparent, therefore, that such an interpretation of the acts of the parties would defeat the object which both had in view in entering upon the correspondence. The fallacy of the argument, in our judgment, consists in the assumption, that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show, that, in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present. The position may be illustrated by the case before us. If the contract became complete, as we think it did, on the acceptance of the offer by the applicant, on the 21st December, 1844, the company, of course, could have no knowledge of it until the letter of acceptance reached the agent, on the 31st of the month; and, on the other hand, upon the hypothesis it was not complete until notice of the acceptance, and then became so, the applicant could have no knowledge of it at the time it took effect. In either aspect, and, indeed, in any aspect in which the case can be presented, one of the parties must be unadvised of the time when the contract takes effect, as its consummation must depend upon the act of one of them in the absence of the other. The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the minds of the par-

ties on the subject be known by each at the moment of concurrence; the acceptance must succeed the offer after the lapse of some interval of time; and, if the process is to be carried farther in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other. It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into a contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties, to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated; instead of postponing its completion till notice of such acceptance has been received and assented to by the company. For why make the offer, unless intended that an assent to its terms should bind them? And why require any further assent on their part, after an unconditional acceptance by the party to whom it is addressed? We have said that this view is in accordance with the usages and practice of these companies, as well as with the general principles of law governing contracts entered into by absent parties. In the instructions of this company to their agent at Fredericksburg, he is advised to transmit all applications for insurance to the office for consideration; and that, upon the receipt of an answer, if the applicant accepts the terms, the contract is considered complete without waiting to communicate the acceptance to the company; and the policy to be thereafter issued is to bear date from the time of the acceptance. The company desire no further communication on the subject, after they have settled upon the terms of the risk, and sent them for the inspection of the applicant, in order to the consummation of the bargain. The communication of the acceptance by the agent

afterwards is to enable them to make out the policy. The contract is regarded as complete on the acceptance of the terms. This appears, also, to have been the understanding of the agent; for, on communicating to the insured the terms received from the company, he observes, 'Should you desire to effect the above insurance, send me your check payable to my order for fifty-seven dollars, and the business is concluded'; obviously enough importing, that no other step would be necessary to give effect to the insurance of the property upon the terms stated. The cases of Adams *v.* Linsdell, 1 Barn. & Ald. 681, and Mactier's Adm'rs *v.* Frith, 6 Wend. 104, are authorities to show that the above view is in conformity with the general principles of law governing the formation of all contracts entered into between parties residing at a distance by means of correspondence. The unqualified acceptance by the one of the terms proposed by the other, transmitted by due course of mail, is regarded as closing the bargain, from the time of the transmission of the acceptance."

§ 49. One of the objections to the claim in the above case was the non-payment of the premium; and the Court, by Mr. Justice Nelson, said, — "One of the conditions annexed to the policies of the company is, that no insurance will be considered as made or binding until the premium be actually paid; and one of the instructions to the agent was, that no credit should be given for premiums under any circumstances. But the answer to this objection is, that the premium, in judgment of law, was actually paid at the time the contract became complete. The mode of payment had not been prescribed by the company, whether in specie, bills of a particular bank, or otherwise; the agent, therefore, was at liberty to exercise a discretion in the matter, and prescribe the mode of payment; and, accordingly, we find him directing, in this case, that it may be paid by a check payable to his order for the amount. It is admitted that the insured had funds in the bank upon which it was drawn, at all times from the date of

the check till it was received by the agent, sufficient to meet it; and that it would have been paid on presentment. It is not doubted, that, if the check for the premium had been received by the agent from the hands of the insured, it would have been sufficient; and in the view we have taken of the case, the transmission of it by mail, according to the directions given, amounts, in judgment of law, to the same thing. Doubtless, if the check had been lost or destroyed in the transmission, the insured would have been bound to make it good; but the agent, in this respect, trusted to his responsibility, having full confidence in his ability and good faith in the transaction."

§ 50. An agreement was made with the president of an insurance company to insure the buildings of the assured, and the president made a brief memorandum of the terms of the agreement, upon the application book of the company, but no policy was made out pursuant to such agreement, because the assured gave notice to the company, that he wished to have the risk differently apportioned, and no premium was paid or secured, nor was the premium charged to the assured; and the assured was notified that he must come to the office and settle the business, or the company would not consider itself liable in case of loss, but the assured did not call, nor did he pay or secure the premium. It was held, that the agreement to insure was not a *consummated* contract, and that the company, therefore, was not liable for a loss which subsequently occurred. Both parties, said Chancellor Walworth, unquestionably understood, that if a loss should occur before the insurance could be consummated in the usual form, the company would be liable therefor; but as there was no agreement to give credit for the premium, and no implied agreement for a credit beyond the time which was necessary to prepare the policy, the neglect to pay the premium, after request, to complete the insurance, was of itself an abandonment of the agreement, which deprived the applicant of all right to

claim payment for the subsequent loss, either at law or in equity.[1]

§ 51. 2dly. Of the *duration* of a fire policy. It has been said, that, in marine insurance, there are many occasions on which it is important to determine whether the policy makes one entire risk or several risks, determinable at several points in the voyage; and so in fire insurance, many important conclusions depend on the solution of the question, whether the risk is one and entire during the period mentioned in the policy, or separable into yearly renewable insurances.[2] It has been supposed in England,[3] that under a fire policy the insurance annually recommences and is renewed, and that these yearly renewals cannot be considered as forming together one original, entire insurance. There, in a policy of fire insurance, (to save the expense of a new stamp for a policy,) it is generally declared, that if the premiums are paid yearly, and if the directors accept the same, the money named in the policy shall be paid to the assured whenever a loss occurs. It is there also understood or declared by insurance companies, that *fifteen days* beyond the expiration of the year, shall be allowed for payment of the next annual premium. The question, therefore, has been whether the allowance of these fifteen days forms a condition uniting with the original contract, so as to form a new contract, namely, that the insurance shall continue from year to year if the future annual premiums be paid within fifteen days from the expiration of the preceding year? It was decided in a case upon this practice of allowing fifteen days beyond the expiration of the period of insurance, that if a loss happened within the fifteen days, the premium being then unpaid, but tendered afterwards before the fifteen days expired, the insurance was at an end.[4] In this case, the agreement under which the plaintiffs were insured, they stipulated that they would pay half yearly, namely, on

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[1] Sandford Trust Fire Ins. Co. 11 Paige, (N. Y.) Ch. R. 547.

[2] Beaum. on Ins. 11.

[3] Ibid.

[4] Tarleton *v.* Stainforth, 5 T. R. 695.

the 10th of June and on the 10th of December, the sum of £7 10*s.*, and that they would, *as long as the managers agreed to accept the same*, make their payments within fifteen days after the day limited. The insurers were held not liable because they and the assured had not agreed for the next half year when the loss happened, and because it would be unjust that the assured should have the interval to consider whether or not he would insure for the next half year; if no loss happened during the fifteen days, he might not insure, but in the event of a loss during that period he would insure after it happened. In order to make the insurers liable, as on a contract, both the contracting parties must be bound; whereas, according to the construction claimed by the assured, only the insurers were bound for the fifteen days. One object of the insurers was to have the policy continued; and to induce the assured to pay the premium at an early period within the fifteen days, he was to be at his own risk between the time when the former insurance expired, and the beginning of the new insurance. In a subsequent case upon this practice of allowing fifteen days, which was tried before Lord Ellenborough,[1] it was decided that where the rate of premium was altered by the insurers, and notice thereof given to the assured, and a refusal on his part to pay the increased premium, then a loss having happened within the fifteen days, and tender of the increased premium having been made after the loss, and within the fifteen days, the insurers were not bound to accept the premium; and that, by the former refusal and actual non-payment of the premium at the time of the loss the insurance was determined, and no sum recoverable for the loss. But in case there is no notice to determine the policy, or to increase the premium, or in case the original policy was for a special period without any power of renewal, (conditional or absolute,) then the insurance is considered as continuing for that special period, or from year to year.[2]

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[1] Salvin *v.* Jones, 6 East, R. 571.

[2] Beaum. on Ins. 13. As an appendage to these illustrations of the law,

§ 52. A policy of insurance executed by a fire insurance company, under their seal, for the term of one year, contained a clause that persons desirous of continuing their insurances, might do so by a timely payment of the premium, without being subject to any charge for the policy. The insurance was continued from year to year by indorsements on the policy, which were not under seal. It was held, that those indorsements did not continue the instrument as a specialty; and, therefore, that an action of covenant would not lie to recover for a loss incurred after the expiration of the first term. The plaintiff, Chief J. Gibson was of opinion, might have demanded a policy in conformity with the clause; a covenant that bills or notes to be drawn, should have the qualities of specialties, would not make them so, or confound the settled distinction of the law. "If the payment of a further premium," said the learned judge, "cannot make the old policy a new one, what is the effect of it? Precisely the effect of an order to insure, and no more. The plaintiff might have demanded a policy in conformity to the clause, and have maintained an action for a breach of it."[1]

§ 53. A difference at one time existed between policies expressed to be granted for a certain period "from the day of

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James, in his work on Life and Fire Insurance, p. 78, says: "We may mention a circumstance which came within our notice about five years since, and one highly honorable to a leading fire assurance company of the city. A gentleman residing in the neighborhood of the West End, by pure accident omitted to pay his fire premiums on the last of the fifteen days allowed for its renewal, and on the day following proceeded to the office, but was, on his way, prevented by other business from arriving there until near four o'clock when he tendered the premium, which was duly accepted without any remark whatever. After the receipt had been given to him the gentleman was informed that, since his leaving home, an accident had occurred at his house and damage done to a considerable extent, and as a compensation for which a check was then placed in his hands for an adequate amount. Such admirable conduct needs no comment."

[1] Luciani *v.* American Fire Ins. Co. 2 Whart. (Penn.) R. 167.

the date" and "from the date," which gave rise to the words "both inclusive." Thus, Lord Chief Justice Holt held, that "from the day of the date" excludes the day, but "from the date" includes it.[1] But this distinction is exploded, and it is now considered, that these expressions mean the same thing. In Pugh *v.* The Duke of Leeds,[2] it was held by the Court of King's Bench unanimously, and after great deliberation, that the words "from the date" and "from the day of the date," mean the same thing; and that they are to be taken to be inclusive or exclusive, according to the context or subject-matter. "Although," says Park, "it will appear that no difficulty could occur on such a point at the present day, yet it is usual, in order to prevent disputes, to insert the words *first and last days included*, in modern policies."[3]

§ 54. The charter to a fire insurance company provided, that where any property insured should be alienated by sale, or otherwise, the policy shall become void, and be surrendered to be cancelled. An alienation of the property, preceding its destruction by fire, was made by the assured, so that when the fire occurred, the policy was a mere nullity. It was said, however, that the company, with full knowledge of the alienation, exacted and received payment of a part of his deposit note for the purpose of meeting losses which occurred subsequent to the alienation, and that, therefore, there was a *waiver of the forfeiture.* But it was held, that although the policy became void by the alienation of the property insured, it did not follow, that the deposit note of the assured was also void. On the contrary, until he surrendered his policy, and paid his proportion of all losses which occurred "prior to such surrender," the deposit note remained obligatory upon him. The assured did not pretend, that he had surrendered his policy previous to the assessment upon him; and he was,

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[1] Sir R. Howard's case, 2 Salk. R. 625.

[2] Pugh *v.* The Duke of Leeds, Cowp. R. 714.

[3] Park on Ins. 436.

therefore, held liable to pay his proportion of the losses for which the assessment was made; the acts of the company, instead of evincing an intention to affirm the existence of the policy, were perfectly consistent with their right to treat it as void.[1]

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[1] Neely *v.* Onondaga County Mutual Ins. Co. 7 Hill, (N. Y.) R. 49.

CHAPTER IV.

OF THE INTEREST OF THE ASSURED.

§ 55. It has been made to appear, that policies of insurance founded upon a mere hope and expectation, and *without some interest*, are objectionable as a species of *gaming*, and so have been called *wager* policies; that every species of gambling policy and all actions upon a wager or bet are reprobated; that they have been expressly prohibited in England, by the statute of 19 Geo. 2, c. 37, and that they have been adjudged illegal, in this country, upon the principles of that statute, without an acknowledgment of it as authority.[1] But policies

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1 See *ante*, Introd. § 18 *et seq.* "It has been sometimes practised," says Magens, "when a lottery was on foot, to insure a certain premium, that a ticket should not be drawn a blank; and if it was, that the insurer should pay for that ticket a sum agreed on. If neither the insurer nor the insured were any ways concerned in the management of the lottery, so as to give room for a suspicion of collusion of fraudulent dealing, we do not perceive any great harm in this; provided moreover, that they acted openly, and the advantage and disadvantage of the chance were visible. For instance, if five persons should risk £100 each, to be determined by one ticket to which of them the £500 should belong; there could be no harm for an insurer to offer any one of them to restore to him his £100, if he should be a loser, provided he paid £82 for the risk. And it is very plain that if all five paid £82 to the insurer, he would have £10 clear profit without running any risk." 1 Magens, Essay on Insurance, published in 1755, § 28. The author adds, — "Our insurance companies in London would doubtless have been greatly benefited had they been permitted (in the lottery of 1753) to insure at a premium of £2½ to make good whatever prize a certain number pitched on by the insured should produce; for if every number had been insured at that rate, the insurers would have gained only a sixth less than the government raised by the lottery; and the insured would have had the same chance

of *fire* insurance, without interest, are peculiarly and extremely hazardous by reason of the temptation they hold out to the nefarious commission of wilful fire, or *arson*, which necessarily is attended with peril of the most deplorable kind to a whole neighborhood.[1] Therefore, it has been, that a more rigorous construction prevailed in England, in case of fire insurance without interest, than on marine insurance, previous to the above-mentioned statute. "I do not find," says Marshall,[2] "that it has ever been a practice to make insurances against fire, avowedly without interest; the probable consequences of such insurances would afford a powerful argument against the legality of any insurance without interest, at common law." Lord Hardwicke, in 1734, declared it to be necessary, that the party assured against fire, should have an interest at the time of insuring and at the time the fire happens;[3] and upon that occasion, he said, — "Not longer ago than when I first sat in the Court of King's Bench, I have heard these insurances called 'fraudulent;' but though inconveniences may have arisen from these words, [interest and no interest inserted in policies,] yet some inconvenience too may arise on the other side, because if any person may insure, whether he has a property or not, it may be a temptation to burn houses to receive the benefit of the policy. By the first clause in the deed of contribution in 1696, the year this society, called 'The Hand in Hand Office,' incorporated themselves, the society are to make satisfaction in case of any loss by fire. To whom and

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for £2½ as others that took tickets at £3. We only remark this by the by, says our author, as it is not to be expected that any association or community of men should have the same liberty as the legislature has, to impose a tax or penalty on the folly of *gaming*, for so it may, with great justice, be called."

[1] 1 Bell, Comm. 540; 3 Kent, Comm. 371; Stetson *v.* Mutual Fire Ins. Co. 4 Mass. R. 230; Swift *v.* Vermont Mutual Fire Ins. Co. 18 Vt. R. 305; Murdock *v.* Chanango Mutual Ins. Co. 2 Comst. (N. Y.) R. 210; Howard *v.* Albany Ins. Co. 3 Denio, (N. Y.) R. 301; De Balle *v.* Pennsylvania Ins. Co. 4 Whart. (Penn.) R. 60.

[2] 2 Marsh. on Ins. 787.

[3] Sadlers Co. *v.* Badcock, 2 Atk. R. 554.

for what loss, are they to make satisfaction? Why to the *person* insured, and for the loss he may have sustained; for it cannot properly be called insuring the *thing*, for there is no possibility of doing it, and, therefore must mean insuring the *person* from damage." Lord Chancellor King also, previously, (in 1721,) in Lynch *v.* Dalzell,[1] held an insurance against fire, without an interest in the property lost, at the time of insuring and at the time of the loss, was void even at common law.

§ 56. Marshall, in his Treatise on Insurance,[2] considers, as it has so been by others considered,[3] that it would be extremely difficult to afford any accurate definition of "insurable interest." The complicated rights which different persons may have in the same thing, require, that not only those persons who have an *absolute* property, but those persons also, who have a *limited* interest therein, may be at liberty to obtain indemnity by insurance. Accordingly, it is recognized in this department of the law, that almost any *qualified* property in the thing insured, or even any reasonable expectation of profit or advantage to be derived from it, may be the subject of this species of contract; certainly if it be founded in some legal or equitable title.[4] But as the contract of insurance is one of *indemnity* against losses and disadvantages, an insurable interest may be proved in the assured without the evidence of any legal or equitable title to the property insured.[5]

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[1] Lynch *v.* Dalzell, 3 Bro. P. C. 497.

[2] 1 Marsh. on Ins. 105.

[3] See Miltenberger *v.* Beacom, 9 Barr, (Penn.) 196

[4] Marshall cites the following case: If a merchant abroad, in order to secure the payment of a debt due to his correspondent in England, mortgage to him his interest in certain goods and freight; the correspondent, after the mortgage becomes absolute, may insure the *legal* interest on his own account, or the *equitable* interest on account of the mortgagor. Per Ashurst, in Smith *v.* Lascelles, 2 T. R. 188. See also Grant *v.* Parkinson, Park on Ins. 267.

[5] Putnam *v.* Mercantile Ins. Co. 5 Met. (Mass.) R. 386. "Insurance,"

It is very clear, that the term *interest*, as used in application to the right to insure, does not necessarily imply *property*;[1] and one of the difficulties in the argument in a case before Mr. Justice Story,[2] was in likening an insurable interest to any other interest in property. Still the line of distinction between wager policies and those coupled with an interest, as was said by Hubbard, J., in Putnam *v.* Mercantile Insurance Company,[3] "must be drawn somewhere."

§ 57. The general doctrine, that any interest in the subject-matter insured, is sufficient to sustain an insurance of *real estate*, is one which has been fully sustained.[4] A person seized of land under a title by *disseisin*, may be considered as the owner; especially if the disseisee's right of entry has been taken away; for if the disseisee has not a right to enter, but

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says Mr. Justice Lawrence, "being *a contract of indemnity*, cannot be said to be extended beyond what the design of such a species of contract will embrace; if it be applied to protect men from those losses and disadvantages which, but for the perils insured against, the assured would not suffer." The learned judge then proceeds to class "insurable interests," as "things immediately subjected to the perils insured against," and "advantages to arise from the arrival of those things at their destined port." Barclay *v.* Cousens, 2 East, R. 546. "It appears to us," say the Supreme Court of Massachusetts, "that the claim of the plaintiff to recover in this action is founded upon an entire misapprehension of the nature and legal effect of the contract of insurance. An insurance of buildings against loss by fire, although in popular language it may be called an insurance of the estate, is in effect a contract of indemnity, with an owner or other person having interest in the preservation of the buildings." Wilson *v.* Hill, 3 Met. (Mass.) R. 66.

[1] Lucina *v.* Crawford, 2 New R. 314; Buck *v.* Chesapeake Ins. Co. 1 Peters, (U. S.) R. 163.

[2] Hancock *v.* Fishing Ins. Co. 3 Sumn. (Cir. Co.) R. 132.

[3] Putnam *v.* Mercantile Ins. Co. 5 Met. (Mass.) R. 386.

[4] 3 Kent, Comm. 371; 2 Am. Lead. Cases, 421; Bixley *v.* Franklin Ins. Co. 8 Pick. (Mass.) R. 86; Fletcher *v.* Commercial Ins. Co. 18 Pick. (Mass.) R. 417; Swift *v.* Vermont Mutual Fire Ins. Co. 18 Vt. R. 305; Franklin Ins. Co. *v.* Drake, 2 B. Mon. (Ken.) R. 471; and see 2 Marsh. on Ins. 789; Brough *v.* Higgins, 2 Gratt. (Va.) R. 408.

only a right of action, he is not the absolute owner of the land. The disseisor is the owner, though his title may be defeasible.[1] So where a lessor on ground rent has entered for the arrears, under a covenant that he may hold until the arrears are paid, and states an account with the sub-lessees of the rents received, in which he charges them with the premium; it is a question for the jury, whether he intended the insurance to cover their interest, though they have objected to the account generally. The lessor's relation to the property is, in principle, similar to that of the possessor of a qualified interest in the premises, subject to defeasance, as for instance, a disseisor.[2]

§ 58. An *equity of redemption* is an insurable interest;[3] and a mortgagor may insure to the full value of his estate, after it has been taken out of his hands by the mortagee, if the equity of redemption still resides in the former.[4] In Strong *v.* Manu-

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[1] Curry *v.* Commonwealth Ins. Co. 10 Pick. (Mass.) R. 535. The facts in this case were these: E. L., having bought a shop, placed it upon his father's land, and occupied it as his dwelling-house. He died, and afterwards, upon the death of his father, the land with this and another house upon it, descended to the two daughters of E. L., as tenants in common, both of whom were married. The husband of one of them gave the plaintiff, who was the husband of the other, a sum of money for the choice of the houses, and he chose the house last mentioned. The plaintiff thereupon occupied the house first mentioned, as his own, and built an addition to it. It was held, that the plaintiff, having a freehold in the land and the exclusive right of occupation and disposal of this house, a representation of the house as his own property, on procuring it to be insured, though not strictly accurate, was not such a misrepresentation as would render the policy void.

[2] Miltenberger *v.* Beacomb, 9 Barr, (Penn.) R. 196.

[3] 2 Marsh. on Ins. 789; 3 Kent, Comm. 371; Tillou *v.* Merchants Ins. Co. 7 Barb. (N. Y.) Sup. Co. R. 574; Swift *v.* Vermont Fire Ins. Co. 16 Vt. R. 305; Fire and Marine Ins. Co. *v.* Morrison, 11 Leigh, (Va.) R. 354; Felton *v.* Brooks, 4 Cush. Mass. R. 203; and see Locke *v.* North American Ins. Co. 13 Mass. R. 61. The owner of a vessel mortgaged by him for its full value, has an insurable interest in it. Higginson *v.* Dall, 13 Mass. R. 96; Delahay *v.* Memphis Ins. Co. 8 Humph. (Tenn.) R. 684.

[4] Columbian Ins. Co. *v.* Lawrence, 2 Peters, (U. S.) R. 25.

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facturers Insurance Company, in Massachusetts,[1] it was held, that the value of the plaintiff's interest in the subject insured, is not material; and, therefore, that the mortgagor of a house, whose right in equity had been seized on execution, had an insurable interest in the house, and that his insurable interest was not devested by a sale on execution of his equity of redemption, so long as his right to redeem continues; and that in case of loss, such assured is entitled to recover the whole sum insured, if the value of the property destroyed amounts to that sum.[2] Where a clause in a policy of insurance against fire, provided, that when any estate mortgaged, should be taken possession of by the mortgagee for breach of the condition, the policy should thereupon be void; it was held, that the policy did not intend to restrain the assured from conveying in mortgage, and that such a conveyance would not avoid the policy, so long as he remained in possession and no entry was made for foreclosure.[3]

§ 59. As persons owning different interests in the same subject may insure their several interests, a mortgagor and the mortgagee may both insure the same building; and in both cases, the particular interest of each need not, as a general rule, be described in the policy; but it may be described as the property of the assured. But where the mortgagee insures solely on his own account, it is but an insurance of his *debt*;[4]

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1 Strong *v.* Manufacturers Ins. Co. 10 Pick. (Mass.) R. 41, and recognized by the court in Catron *v.* Tennessee Ins. Co. 6 Humph. (Tenn.) R. 176.

2 Hughes on Ins. 51; Ellis on Ins. 22; Beaum. on Ins. 21; Traders Ins. Co. *v.* Roberts, 9 Wend. (N. Y.) R. 404; S. C. 17 Ib. 631; Stetson *v.* Mutual Fire Ins. Co. 4 Mass. R. 330; Miltenberger *v.* Beacom, 9 Barr, (Penn.) R. 198; Connover *v.* Mutual Ins. Co. 1 Comst. (N. Y.) R. 290; Pratt *v.* Phœnix Ins. Co. 1 Browne, (Penn.) R. 267, cited in 1 Phill. on Ins. 108; Jackson *v.* Massachusetts Mutual Fire Ins. Co. 23 Pick. (Mass.) R. 418.

3 Jackson *v.* Massachusetts Mutual Fire Ins. Co. 23 Pick. (Mass.) R. 418.

4 A mortgage is in fact but a *chose in action*, at least, until entry to foreclose; and though the legal effect of the mortgage is to give an immediate right of entry, or of an action to the mortgagee, yet the estate does not

and if his debt is afterwards paid or extinguished, the policy, from that time, ceases to have any operation; and even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustains no damage thereby. Neither can the mortgagor take advantage of the policy, for he has no interest whatever therein. On the other hand, if the premises are destroyed by fire before any payment or extinguishment of the mortgage, the underwriters are bound to pay the amount of debt to the mortgagee, if it does not exceed the insurance. But, then, upon such payment the underwriters are entitled to an assignment of the debt from the mortgagee, and may recover the same amount, either at law or in equity, according to circumstances; for the payment of the insurance by the underwriters, does not, in such case, discharge the mortgagor from the debt, but only changes the creditor. The mortgagee can insure for himself only to the extent of his debt, whereas the mortgagor can insure to the full value of the property, notwithstanding the incumbrance upon it; and, therefore, the insurable interests of mortgagor and mortgagee differ essentially.[1] If a mortgagee in possession for condition broken, insure his interest in the premises, without any agreement therefor between him and the mort-

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become his in fact, till he does some act to divest the mortgagor, who, to all intents and purposes, remains the owner of the land, till the mortgagee chooses to assert his rights under the mortgage. The equity of redemption is considered to be the real and beneficial estate, tantamount to the fee at law, and it is accordingly held to be descendible by inheritance, devisable by will, and alienable by deed, precisely as if it were an absolute estate at law; and this interest continues till foreclosure. Eaton *v.* Whitney, 3 Pick. (Mass.) R. 484; Smith *v.* People's Bank, 11 Shep. (Me.) R. 185; Abbott *v.* Mutual Fire Ins. Co. 17 Shep. (Me.) R. 414. By the British registry act, (stat. of 6 Geo. 4, c. 140,) the ownership of a mortgage is distinguished in the register from the absolute ownership; and it has been held, that the mortgagee of a ship whose lien amounted to £900, and who had effected an insurance to a much greater amount, was only entitled to recover the amount of his lien. Irving *v.* Richardson, 2 B. & Adol. R. 193.

1 Carpenter *v.* Washington Ins. Co. 16 Peters, (U. S.) R. 475; Motley *v.* Manufacturers Ins. Co. 16 Shep. (Me.) R. 337.

gagor, and a loss accrues, which is paid to the mortgagee, the mortgagor, on a bill to redeem and an account stated for the purpose, is not entitled to have the amount of such loss deducted from the mortgagee's charges for repairs. There is no privity in fact or in law, between them in the contract of insurance.[1]

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[1] White *v.* Brown, 2 Cush. (Mass.) R. 412. In a case in the Supreme Judicial Court of Pennsylvania, — Smith *v.* Columbian Ins. Co., — contained in the Boston Law Reporter for June, 1852, p. 86, Gibson, C. J., says — "The interest of a mortgagee is a special, but an insurable one; and it may, at his option, be insured generally or specially: generally, when he says nothing about his mortgage, and insures as the entire owner; and specially, when the nature of his interest is specified in a memorandum. By the first, he pays a premium proportionate to the risk of the absolute ownership: by the second, a premium proportionate to the risk of a less and derivative ownership. In the one case and in the other, the subject of the insurance is apparently the *corpus* of the thing insured, but actually, the interest of the party assured on it. If the absolute owner be insured, he recovers the full value of the thing lost, because his interest in it is commensurate with its value. If the owner of a limited interest in it is insured, he recovers only to the extent of his interest. Each may insure separately and recover separately *pro interesse suo*. A policy of insurance has been, from the beginning, a rude and undigested instrument, whose legal effect, moulded by usage and judicial decision, is different from a strict interpretation of it. As the words of an execution are frequently controlled with us by an indorsement, so are the words of a policy frequently controlled by a memorandum. Notwithstanding the form of the contract, therefore, a mortgagee insures, whether generally or specially, not the ultimate safety of the whole of the property, but only so much of it as may be enough to satisfy his mortgage. It is not the specific property that is insured, but its capacity to pay the mortgage debt. In effect, the security is insured. The fallacy of the argument on the part of the defendant, is in assuming that the words in the policy, 'to pay, make good, and satisfy, all such damages or loss which shall or may happen by fire to the property,' bind the insurer to pay, in every case, to the extent of an outside price for which it might be sold unincumbered in the market. What is the property insured? Not the thing independent of ownership; for if the law were otherwise, a policy might be to some extent a wagering one. The beneficial interest in it is insured, and only to the value of it can the owner of it recover for a loss of it, because the contract of insurance is strictly a contract of indemnity. No

§ 60. Where the owner of mortgaged premises insures them for his own benefit, and the premises are destroyed by fire, the mortgagee is not entitled to the money payable by the insurers on account of such loss; although the assured be personally liable for the debt secured by the mortgage.[1] But, as the doctrine, that if a person makes a promise for the benefit of a third person, the latter may sue upon it in his own name, is the appropriate doctrine of the contract of insurance; if a mortgagor procures insurance in his own name, but with a stipulation, that the amount of loss, if any, shall be paid to the mortgagee, a suit on the policy may be maintained in the name of the mortgagee;[2] the fact of bringing such suit ratifies the act of procuring insurance for his benefit.[3]

§ 61. The consent of the insurers, that a policy previously issued to the owners of the property, may be assigned to the holder of a mortgage, will be deemed in the nature of a contract with him, by which he becomes insured, to the amount which the assignment was intended to secure.[4]

§ 62. Whenever a mortgagor *is bound* to insure the premises, for the protection and indemnity of another person, the latter will have an *equitable* lien for the money due on the

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one would pretend that the mortgagee of a house, who had insured it, could recover for the burning of a few shingles on the roof of it, though the unimpaired value of the building might be much greater than the amount of the mortgage. Were the law otherwise, the mortgagee might recover from the insurer the value of the property lost, and the whole of his mortgaged debt from the mortgagor of the property saved. In reference to the clear value of the property insured, therefore, the existence of incumbrances is always material to the risk. Were it not, the holder of a mortgage for hundreds, might insure and recover for thousands on a gambling policy."

[1] Carter *v.* New York Fire Ins. Co. 8 Paige, (N. Y.) R. 437.

[2] Motley *v.* Manufacturers Ins. Co. 16 Shep. (Me.) R. 337.

[3] See Meltenberger *v.* Beacom, 9 Barr, (Penn.) R. 198; De Bolle *v.* Pennsylvania Ins. Co. 4 Whart. (Penn.) R. 468.

[4] Tillou *v.* Kingston Mutual Ins. Co. 7 Barb. (N. Y.) Sup. Co. R. 570

policy to the extent of his interest in the property destroyed by the fire; so that whenever a mortgagor covenants with the mortgagee to keep the premises insured during the continuance of the mortgage thereon, and the buildings on the premises are destroyed by fire, the mortgagee has an equitable lien upon the money due upon the policy.[1] Where the mortgagor covenanted with the mortgagee, that he would keep the premises insured during the continuance of the lien of the mortgage, and, in case of loss, that the amount received on the policy should be applied to the rebuilding of the property, the Court of Chancery in Maryland decided, that the mortgagee had an equitable lien upon the fund received by the mortgagor under the policy to satisfy the balance due upon the mortgage, which could not be collected on a foreclosure and sale of the mortgaged premises.[2]

§ 63. There is a manifest difference between a mortgage of *real*, and one of *personal*, property, inasmuch as the former is merely a security for a debt, so that the mortgagee has only a chattel interest, the freehold remaining in the mortgagor. The interest of the mortgagor cannot be sold on default without a bill of foreclosure; whereas a mortgage of personal property transfers the whole interest, and in fact the mortgagee becomes the owner, and so absolute is his interest in the thing mortgaged, that the mortgagor cannot, by tendering the debt, entitle himself to an action of trover against the mortgagee.[3] In Lockwood *v.* Ewer,[4] a bill was brought to redeem £2,500, East India stock, transferred to secure the payment of £2,000, and interest. The Lord Chancellor considered it a plain case for

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[1] Carter *v.* New York Fire Ins. Co. 4 Paige, Ch. R. 437.

[2] Thomas's Ex'rs *v.* Van Kaff's Ex'rs 6 Gill and Johns. (Md.) R. 372. And see Vernon *v.* Smith, 5 B. & Ald. R. 1; Tillou *v.* Kingston Mutual Fire Ins. Co. 7 Barb. (N. Y.) Sup. Co. R. 590.

[3] After condition forfeited. Rogers *v.* Traders Bank, 6 Paige, (N. Y.) Ch. R. 583; Conard *v.* Atlantic Ins. Co. 1 Peters, (U. S.) R. 441, 446; Brown *v.* Bement, 8 Johns. (N. Y.) R. 96; Ackley *v.* Finch, 7 Cow. (N.Y.) R. 290.

[4] Lockwood *v.* Ewer, 2 Atk. R. 303.

the defendants; and held, that although on a mortgage of land, a bill of foreclosure ought to be brought, yet on a mortgage of stock, it was not necessary. Where the agents for the proprietors of a steamboat effected an insurance upon the boat for the benefit and on account of whomsoever it might concern, at the time of loss, if any should occur; it was held, that a mortgagee of the interest of one who was an owner at the time of the insurance, and for whose benefit the policy was underwritten, had a right in the mortgagor's portion of the insurance money, to the extent of the debt secured by the mortgage.[1] The Chancellor, in delivering his opinion, said, — "In this case, the underwriters contemplated that a change in the ownership of the boat might take place during the continuance of the risk, and intended to insure whoever might be the owners from time to time, so that those who should be interested *as such owners* at the time when any loss should occur, should have the benefit of the policies. But as the policy in terms insured whoever should be the owner of the boat at the time of loss, and Stow was then the owner of one quarter, by virtue of the assignment from D., all pretence of a lien upon that portion of insurance money for any general balance which might be due from D. & Co., entirely fails." In England, before the registry act of 6 Geo. 4, c. 140, the mortgagee of a ship was in point of law the owner, and might insure to the full extent of the ship's value to the mortgagor as well as to himself; but by that statute the interests of mortgagor and mortgagee are more distinctly severed than they formerly were; and the mortgagor now does not cease to be an owner.[2]

§ 64. Of course a husband whose wife has title to real property, and who has had issue born alive to the husband, has an insurable interest in the buildings thereon; even though the wife's title is only in the right of a joint tenant.[3]

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[1] Rogers *v.* Traders Ins. Co. 6 Paige, (N. Y.) Ch. R. 583.

[2] Irving *v.* Richardson, 6 B. & Adol. R. 193.

[3] Franklin Ins. Co. *v.* Drake, 2 B. Mon. (Ken.) R. 47.

§ 65. A *tenant from year to year* has an insurable interest in buildings demised to him, though he cannot recover the value of such buildings in case of loss by fire; the interest of the assured being merely his right to possess and occupy them, for the unexpired portion of the year for which they were demised.[1] In Laurent *v.* Chatham Fire Insurance Company,[2] the company had insured $800 on a building, which was destroyed by fire. It was proved on the trial that the plaintiff was the lessee of the land on which the building stood, and although he had erected it himself, and was entitled to remove it at the end of his term, the lease had only seventeen days to run when the fire occurred. The value of the building, as it stood, was worth $1,000, but if it were necessary to remove it from the lot demised, it was not worth, for that purpose, more than $200. The court decided, that the value as it stood, was the measure of damages under the circumstances in which he was placed. The argument of Chief Justice Jones in this case, is elaborate, and satisfactorily shows, that as it is upon the tenement upon which the insurance is made; so the actual value of the tenement, as a building, is the loss of the assured, on its destruction by fire; that however unproductive the property may be, or however great may be the extent of the revenue derived from it, the measure of indemnity, in case of loss, is simply its value as a building.[3]

§ 66. It is a fact of public notoriety, that in common parlance the person who is in possession of real property as owner, under a valid and subsisting contract for the purchase thereof, whether he has paid the whole purchase-money, and obtained the legal title or not, is called the owner thereof, and the property is usually called *his* by others. In equity, it is, in fact,

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[1] Niblo *v.* North American Fire Ins. Co. 1 Sand. (N. Y.) Sup. Co. R. 551; and see Fletcher *v.* Commonwealth Ins. Co. 18 Pick. (Mass.) R. 419.

[2] Laurent *v.* Chatham Fire Ins. Co. 1 Hall, (N. Y.) R. 41.

[3] And see Wright *v.* Sun Fire Office, 3 Nev. & Mann. 819; S. C. 1 Adol. & Ell. R. 621; Brough *v.* Higgins, 2 Gratt. (Va.) R. 408.

his; and the vendor has only a lien thereon for the security of his unpaid purchase-money; and it would be singular if the person who is in the actual possession of property as the real owner thereof in equity, and who must sustain the whole loss thereof primarily in case of its destruction by the perils insured against, cannot insure it as owner.[1] The doctrine that such a person has an insurable interest has been sustained by the Supreme Court of the United States, in the case of the Columbian Insurance Company *v.* Lawrence,[2] where it was held that a party in possession of a mill under an executory agreement of sale, might insure his interest in the premises, notwithstanding the non-fulfilment of a stipulation, upon the breach of which the agreement was conditioned to be void, it being obvious, that the contract might notwithstanding be ratified and carried into effect by the other party.[3] Cases involving the same doctrine have been decided in the State of New York. In M'Givney *v.* Phœnix Fire Insurance Company,[4] the assured had agreed to purchase a building used by him for a grocery, and a stable and shed adjoining, and pay for them in five equal annual instalments with interest, a conveyance to be received when all the instalments should be paid; and he had gone to work and made extensive repairs on the premises, and then effected insurance upon them. Within the first year after making the contract to purchase, he had paid a year's interest on the amount of the purchase-money agreed upon, but whether this payment was made before or after effecting the policy, the report of the case does not disclose. It was held, that the assured had an insurable interest, the court saying, that "he had made payment, and had made

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[1] Per Walworth, Chan., in Etna Fire Ins. Co. *v.* Tyler, 16 Wend. (N. Y.) R. 385.

[2] Columbian Ins. Co. *v.* Lawrence, 2 Peters, (U. S.) R. 25.

[3] The decision thus made was fully confirmed by the court when the case was subsequently before it. 10 Peters, (U. S.) R. 507; and see on this subject, 2 Am. Lead. Ca. 419.

[4] M'Givney *v.* Phœnix Fire Ins. Co. 1 Wend. (N. Y.) 85; and see Fletcher *v.* Commonwealth Ins. Co. 18 Pick. (Mass.) R. 419.

valuable improvements." In Etna Fire Insurance Company *v.* Tyler,[1] it was held, that a party in possession as vendee under a subsisting executory contract, has an insurable interest to the full extent of any injury sustained by fire, although the purchase-money may have remained, for the greater part, due and unpaid; that though, under such circumstances, the effect of a loss might be to give a right of action on both the insurances, one by the vendee and the other by the vendor, yet the recovery on the policy made by the vendee would extend to the whole value of the property, while that of the vendor would be limited to the amount remaining due on the contract, under which the insurer would be entitled to *subrogation* for the purpose of enforcing its fulfilment.[2]

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[1] Etna Fire Ins. Co. *v.* Tyler, 16 Wend. (N. Y.) R. 385, and see 12 Ibid. 507.

[2] The principle of equitable *subrogation* or *substitution* of the underwriters in the place of the assured, is recognized by every writer on the subject of insurance. The rule is thus laid down by Phillips: "Where the insurable interest consists of a debt due to the assured, as in the case of advances made by a consignee, or a policy on the life of the debtor, the assured is bound, no doubt, to assign to the underwriters his debt or his insurable interest, whatever it may be, in case of his being paid a total loss." 2 Phill. on Ins. 282. The principle is constantly acted upon in courts of law as well as in equity; so that where the assured has any claim to indemnity for his loss against a third person, who is primarily liable for the same, if the assured discharges such third person from his liability before the payment of the loss by the underwriters, he discharges his claim against them, for such loss, *pro tanto*. Or if he obtains payment from such third person afterwards, it is in the nature of salvage, which he holds as trustee for the underwriters who had paid his loss. Per Chan. Walworth, in Etna Fire Ins. Co. *v.* Tyler, 16 Wend. (N. Y.) R. 397. In a case where the assured recovered to the full amount of the policy upon a condemnation of a vessel and cargo under the Berlin and Milan decrees, although there was no abandonment of the *spes recuperandi*, against the French government, Chief Justice Kent says, that if France should at any time hereafter make compensation for the capture and condemnation, the United States, upon the receipt of the money, would hold it as trustee for the party having the equitable interest therein; and that would clearly be the underwriter. Gracie *v.* New York Ins. Co. 8 Johns. (N. Y.) R. 246. And see Atlantic Ins. Co. *v.*

§ 67. In general, in these cases of a *bonâ fide* equitable interest, the assured may insure under the general name of property, and without stating the particular interest he has to be insured;[1] but there may of course be something in the terms of the policy, or in the conditions referred to therein, to the contrary. In the case of *mutual* insurance companies, wherein a lien in behalf of all concerned, is created, and wherein the true state of the title is material to enable the company officers to judge of the security which the insured premises will afford for the premium note, if an assessment should be necessary, the state of the title should be disclosed.[2] In Brown *v.* The Thomaston Insurance Company, in Maine,[3] it appeared, that a mutual insurance company were entitled to a lien on all the property insured by them, and that the assured, in his application for insurance upon a building, omitted to state that he had only a bond for a deed of it upon the performance of certain conditions, which were never performed. It was held, that the company were not liable to pay for a loss by fire, otherwise within the policy. Each member of the company was interested in having such a security from every other member thereof, as would insure the payment of his propor-

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Storrow, 5 Paige, (N. Y.) Ch. R. 285; Godsall *v.* Bolders, 9 East, R. 72. Where the same property is insured with several insurers, and one is sued for the whole loss, the insurer can recover a contribution from the others. Beaum. on Ins. 56; Newby *v.* Read, 1 Bla. R. 416. It is the exercise of the equitable powers of the court to afford a summary remedy to a meritorious creditor, who may otherwise be subjected to loss by the operation of proceedings at law against the estate or funds of a common debtor. The exercise of this equitable power is to be approved and enforced, when it does not conflict with the legal or equitable rights of other creditors of the debtor. Per Chambers, J., in McGinnis's Appeal, 4 Harris, (Penn.) R. 445.

[1] See Traders Ins. Co. *v.* Roberts, 9 Wend. (N. Y.) R. 404; Tyler *v.* Etna Fire Ins. Co. 12 Ibid. 507.

[2] Per Chan. Walworth, in Etna Fire Ins. Co. *v.* Tyler, *ubi sup.*

[3] Brown *v.* Thomaston Ins. Co. 15 Shep. (Me.) R. 252; and see Wells *v.* Hill, 3 Met. (Mass.) R. 66; Hamilton *v.* Lycoming Co. 5 Barr, (Penn.) R. 339.

tion of any losses occasioned during their mutual membership; and if an assessment upon one should fail to be collected, it must be assessed upon the others.[1]

§ 68. Perhaps, the best illustration of an insurable interest is that given by Lord Eldon, in Lucena *v.* Crawford:[2] "Suppose A. to be possessed of a ship limited to B., in case A. dies without issue; that A. has twenty children, the eldest of whom is twenty years of age, and B. ninety years of age; and it is a moral certainty, that B. will never come into possession, yet this is a clear interest. On the other hand, suppose the case of the heir at law of a man who has an estate worth £20,000 per annum, who is ninety years of age; upon his death bed, intestate and incapable from incurable lunacy of making a will; there is no man who will deny that such an heir at law has a moral certainty of succeeding to the estate, yet the law will not allow that he has any interest, or any thing more than a mere *expectation.*"

§ 69. A right too must be of such a nature, in order to constitute an interest, as the law will recognize and enforce, for a mere *moral* title will not sustain an insurance; and upon this ground it was held, that a policy effected on some oil, by a merchant who had entered into a contract for its purchase, which was incapable of being enforced by him for want of the formalities prescribed by the Statute of Frauds, was void.[3] Where the master of a ship having borrowed money for repairs, gave the owner bills on the owner of the ship, and on the consignee of the cargo for the amount, and also an instrument by which he purported to hypothecate the vessel, &c., and stipulated that, in case the bills were not accepted and paid, the lenders might take possession and sell, under process of the Admiralty Court, and in which it was agreed that the

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[1] See *ante*, § 10.

[2] Lucena *v.* Crawford, 2 New Rep. 324.

[3] Stockdale *v.* Dunlop, 6 M. & Welsb. R. 224.

lender should forbear maritime interest, and that the advances were to be recoverable whether the vessel arrived at its port of destination or not; it was held, that the *instrument was void*, and that therefore the lender had no insurable interest.[1] Upon the same principle the purchaser of an estate who has merely entered into a *verbal* contract cannot insure, but if any act has been done constituting such a part fulfilment of it as would entitle him to a specific performance in a Court of Equity, he may do this, since an equitable title creates an interest which the law will recognize;[2] and so if an estate is vested in a trustee, either the trustee or the party beneficially interested, may insure.

§ 70. In a case in the English Court of Exchequer, in January, 1852, it appeared, that a person discharged by the Insolvent Debtors Court as an insolvent debtor, had effected an insurance against fire on some property acquired by him before the insolvency. The property having been destroyed by fire, the order for his discharge was afterwards annulled on the ground of fraud, and the insolvent adjudged to undergo twelve months' imprisonment from the date of the vesting order. He then brought an action on the policy, to which the insurance office pleaded, that he had no insurable interest in the property; but the action was sustained.[3]

§ 71. In a case of a debtor's assigning property to be disposed of, and the proceeds of it to be applied to the payment of his debts, an insurable interest still remains in the property to its full value, as long as his own debts, to discharge which the property is assigned, remain in force against him and unreleased. A steamboat insured in the name of the owner, the loss to be payable to the agents by whom the policy was

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[1] Stainbank *v.* Fenning, 6 Eng. Law & Eq. R. 412.

[2] Tidswell *v.* Ankerstein, Peake, R. 151; Fletcher *v.* Commonwealth Ins. Co. 18 Pick. (Mass.) R. 419.

[3] Marks *v.* Hamilton, 16 Jur. 152.

procured, was assigned by the owner of it, among his other effects, for the benefit of his creditors, and with a resulting trust for his own benefit after the creditors should be fully paid; the creditors at the same time to give an absolute release and discharge of their demands; and, after the assignment, the steamboat was lost. It appearing, that the property assigned was sufficient to pay the creditors, and leave a surplus equal to the value of the steamboat, it was held, that the assured still had an insurable interest in her to her full value, equivalent to that of mortgagor or *cestui que trust.* If the steamboat had not been lost but had gone into the hands of the assignee, and had been sold by him, and the proceeds distributed according to the assignment, the insurance company would have held their premium, and the assured would have had the benefit of the vessel in the increased amount of the surplus remaining, after the payment of the debts; the vessel would be represented by the policy. But, it was contended, that if the assured had any insurable interest in the vessel, it was only such a proportion of her agreed value as the surplus, if any, of the effects assigned, remaining after paying the debts of the releasing creditors, bore to the whole value of the property assigned. For example, suppose the whole assets to amount to $115,000, the insurance to be for $10,000, the debts to amount to $100,000: the plaintiffs' claim would be cut down to about $1,300. But the court knew of no rule of law which called for the establishment of such an apportionment, and it would moreover be as inequitable a one as it would b novel.[1]

§ 72. Where the goods of an assured were levied on by the sheriff, by virtue of an execution against him; and the sheriff

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[1] Lazarus *v.* Commonwealth Ins. Co. 19 Pick. (Mass.) R. 81. This action was tried many years ago, and the verdict for the plaintiff was set aside, and a new trial granted at March Term, 1827, as the report of it in 5 Pick. R. states, because the verdict was given "without evidence of a probable surplus after paying the debts for which the property was assigned."

took actual possession of the goods, and left them in the store of the assured, the doors of which he fastened, and the windows of which he nailed up; and the sheriff went out of town and took the key of the store with him; and, during his absence a fire took place, which destroyed the store with its contents; it was held, that the assured was nevertheless entitled to recover. The right of the sheriff, by virtue of the seizure, was defeasible, it being his duty to release and give up the goods to the defendant in the execution, upon a tender of the debt and damages, as the case might be, with the costs, being made to him.[1]

§ 73. It is said in Lucena *v.* Crawford,[2] that it is not necessary, that the assured should have a beneficial interest in the property insured; that it is sufficient, if he be clothed with the character of *trustee*, or *agent*, or *consignee*, and Lord Eldon remarks, that a trustee has a legal interest in the thing, and may, therefore, insure.[3] As a consignee, factor, or agent, has a lien on goods to the amount of his advances, acceptances, and liabilities, he stands, in this respect, precisely in the situation of a mortgagee; and he has, therefore, an insurable interest in the goods, to the amount of his lien.[4] The consignment is, most generally, accompanied by the delivery of the bills of lading to the consignee; and where no bill of lading accompanies the goods, the delivery of them, with written or verbal authority to sell, must be tantamount, and in each case,

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[1] Franklin Fire Ins. Co. *v.* Findlay, 6 Whart. (Penn.) R. 483.

[2] Lucena *v.* Crawford, 3 Bos. & Pull. R. 95; S. C. House of Lords, 5 Ib. 289.

[3] Yallop, *ex parte*, 16 Ves. R. 67. See *ante*, § 56, 57; Crawford *v.* Hunter, 8 T. R. 13.

[4] Phill. on Ins. 114; Aldrich *v.* Equitable Safety Ins. Co. 1 Wood. & Min. Cir. Co. R. 272; Buck *v.* Chesapeake Ins. Co. 1 Peters, (S. C.) R. 151. That a trustee may insure, and after the happening of the loss within the policy, recover the amount for the benefit of the party really interested, has long since ceased to be an open question. Siter *v.* Motts, 1 Harr. (Penn.) R. 218.

the consignee is virtually a trustee. He has an insurable interest which gives him the right, but does not impose upon him the obligation to keep the property under insurance; he is to exercise his own judgment, and to insure or not, according to circumstances; he may be dissatisfied with the terms of the insurance, or he may have stored the goods in a fire-proof store of such location, as to be, in his judgment, sufficiently secure from fire.[1]

§ 74. The disclosure of the fact that goods are held by the assured on commission, is notice to the insurer, that the goods were not to be in the charge or custody, or under the care of the owner of them; but of his agent and factor, during the continuance of the risk; and, therefore, the insurer looks to the character of the factor, and not to that of the owner, for discretion, integrity, and vigilance.[2] In the case of Parks *v.* The General Insurance Company, in Massachusetts,[3] the question was presented as to the insurable interest of a consignee, where it appeared that insurance had been effected by him upon goods in his store. He represented, that he was in the habit of receiving goods for sale, and making advances upon them, and that he wished to obtain insurance upon them to secure them against loss by fire, as the consignors might not be able to repay the advances. It was held, that, construing the policy and representation together, the insurance attached to goods received by the plaintiff as consignee; that it covered his interest in them, and not that of the consignors.[4]

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[1] De Forest *v.* Fulton Fire Ins. Co. 1 Hall, (N. Y.) R. 84.

[2] De Forest *v.* Fulton Fire Ins. Co. *ubi sup.*

[3] Parks *v.* General Ins. Co. 7 Pick. (Mass.) R. 34.

[4] Goods held in trust on commission, will not be covered by the policy, unless insured as such, although the party may have a lien for advances. Bricta *v.* Lafayette Ins. Co. 2 Hall, (N. Y.) R. 372. But the words "goods held on commission," in fire policies, are equivalent to the clause "for whom it may concern," in marine policies. They contain a distinct declaration to the insurers, that the assured is acting for the benefit of his consignors. De Forest *v.* Fulton Fire Ins. Co. 1 Hall, (N. Y.) R. 84.

§ 75. But the question of constructive interest as applicable to a *consignee*, seems to have been carried to a greater extent than ever before, in De Forest *v.* Fulton Fire Insurance Company.[1] The action was on a policy of insurance to recover for loss and damage to goods by fire, and it appeared, that by the terms of the contract the company insured the plaintiff against such loss and damage on goods and merchandise, hazardous, and not hazardous, as well the property of the assured, as held by them in trust, or on commission, contained in the store No. 82, South Street; and the insurers promised and agreed to make good to the assured, all such loss or damage, to be estimated according to the true and actual value of the property at the time the loss should happen. A fire happened, by which loss was sustained on goods and merchandise, partly the property of the plaintiff, and partly held by them on commission, then in the store described in the policy, to a large amount. The right of the assured to indemnity was admitted; and the question was upon the extent of the liability of the insurers for the goods held on commission; or, in other words, *what the insurable interest of the plaintiff was.* The plaintiff insisted upon the right to recover the full amount of the loss to the goods in question, by fire; and the defendants contended, that they were bound to indemnify to the amount *only* of loss sustained by the plaintiff in his own right. It was admitted, that the plaintiff had an insurable interest in the goods they held on commission, and were entitled to recover to the amount of their advances thereon, with interest, and their mercantile commissions and charges as factors; but the insurers insisted, that those were the only interests which the plaintiff had at risk, at the time of the fire, and that all the assured could claim was an indemnity to themselves for their own loss. The court, however, held otherwise; and in the elaborate opinion delivered by Jones, C. J., it is laid down as law, that a commission merchant, having in his possession the goods of his principal, deposited with him for sale, has an

[1] De Forest *v.* Fulton Fire Ins. Co. 1 Hall, (N. Y.) R. 84.

interest in the property which entitles him to insure the same against fire, *in his own name*, to the full value of the goods. Mr. Justice Oakley, in delivering his opinion, and in allusion to the observation of Mr. Phillips,[1] that the insurable interest of a consignee or factor, is limited to the extent of his lien, remarks, — "He gives no authority for his position; and he lays it down without any discrimination between Marine and Fire Insurance. It might be well contended, (if it were necessary,) that a more liberal rule ought to be adopted, as to the extent of the insurable interest of a factor, in the case of insurance against *fire*, than in the case of *marine* insurance. The convenience of trade would seem to point out and sanction a difference in the application of the rule to the two kinds of insurance." Chief Justice Jones, in the same case, recognizes this difference between the insurance of goods against maritime risks on *the voyage of exportation*, and the protection of them by insurance *while in store*, against fire.[2]

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[1] 1 Phil. on Ins. 114.

[2] "In the first place," said C. J. Jones, "the consignee has not the full possession of them, and is not invested with all his powers over them, until the arrival and delivery of *them* to him. But without laying stress upon that circumstance, I observe, in the next place, that the great reason why the consignee for sale does not insure, and is not expected to insure against maritime risks on the voyage of importation without an order for the purpose, is, that the consignor, in such cases, effects the insurance himself, and he does so, for the most cogent reasons. He is on the spot, capable of determining for himself whether he will insure or not; and if he prefers insuring, can select his own underwriter, and be sure of having the property satisfactorily covered. If he trusts to his foreign correspondent he may be disappointed; his orders may miscarry, or not arrive in season, or his consignee may fail, and besides, in case of loss, the insurance if made by him at home will be the more readily and more easily realized, and with greater advantage to himself, than if to be collected by agents abroad, and remitted by them to him. He therefore will seldom trust a concern so interesting in its consequences to his factor abroad, when he can attend to it himself at home. And hence it is, that orders to insure are not usually given to consignees, unless they are required to make advances on the goods in anticipation, and the insurance is to be for their own protection and security. The consignee, therefore, would not, ordinarily, insure against the maritime risk

§ 76. In a case before Lord Mansfield, a contractor for supplying certain public stores, set up an insurable interest in a

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of the voyage, without the orders of the consignor, or some reason to induce the act. But if he should, upon the receipt of the bills of lading, effect insurance *bonâ fide*, and for just cause, upon the goods consigned to him, for the voyage of importation, I am not prepared to say, that the contract would be void, or that the charge of the premium could be rejected by the consignor. But the objection to a maritime insurance on the goods, on the voyage, does not apply to the insurance against fire, during their continuance in the warehouse of the factor, waiting for buyers. That insurance devolves immediately, and almost of necessity, upon the factor. He has the exclusive possession and charge of the goods. He is interested in the safety and profitable sale of them; has the means of reimbursing himself the premium, and possesses all the knowledge of the place of deposit, which is required to effect a valid insurance upon them. But the consignor, from his distance, and his want of local knowledge, will be unable to judge of the necessity of insurance, or the nature of the risk, or to describe the building, in which the goods may be stored, with sufficient certainty for a binding contract. These considerations satisfy me, that in principle the consignee, who has the actual possession of the property, with plenary powers of sale, must be clothed with a special property in the goods, so as to enable him to effect a valid insurance upon them in his own name, and to entitle him to recover for the loss of them, upon an averment of interest in himself. I have found no adjudged case necessarily impugning that conclusion; and the current of judicial opinion is in favor of the principle. But again; if it should be conceded that the consignee has not the right to insure the goods of his principal under other circumstances, or against other risks, he must, I think, from necessity, be vested with the power to insure against loss or damage by fire, in his warehouse, for the safety of the goods while they remain in his hands for want of buyers. And if his special property does not (though I think it does) give him the right to insure, as upon an insurable interest in himself, beyond his own beneficial interest, or subsisting liens, he must still have the special power at his discretion, and without any specific instructions to effect insurance on the surplus interest for the benefit of his consignor. And in this point of view, the usage found by the jury might have an important bearing upon the rights of the parties. For, if such insurances are sanctioned by usage, those who send their goods to a market where the custom prevails, must be presumed to know its custom, and to act upon the knowledge of it, in regulating their consignments. And these defendants, who knew the plaintiffs as commission merchants, and were apprised by the declaration of the policy, that the insurance was to be upon goods held on commission,

cargo expected in the market, from which he was to be supplied; and this was allowed; the expected profits of his bar-

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must be taken to have entered into their contract with reference to the usage, and must abide by its influence on their liability. The general prevalence of such a custom might account for the absence of orders to insure; the consignees choosing to trust to the judgment and discretion of the factors residing on the spot, and possessing a full view of the whole ground, as to the expediency of insurance against fire, rather than to bind them down by express orders to the duty of insuring at all events. It would be difficult to account for the indifference and inattention of the consignor's interests, which the neglect to give the orders would otherwise manifest, upon any other supposition than that of a settled conviction on their part, resulting, from past experience, or the advice of counsel, of the right of the consignee to insure, and a confidence in the judicious exercise by them of the power, or that of a reliance upon the conformity of the consignee to an established usage for the factor to keep the goods sent to him for sale, under insurance, until sold. But it is contended, that such an insurance would be for the indemnity of the owner of the goods; and to be sustainable as an insurance for his benefit, and on an implied authority from him, the policy must be in his own name, or the terms of it must be sufficiently comprehensive to embrace him, and cover his interest; and that the loss, moreover, which may happen, must be recovered on an averment of interest in him. These may be requisite of an insurance effected by an agent, insuring by the order, and on the account of his principal solely, or by a naked consignee, who has the possession merely without the power to dispose of the subject he insures; and they are rules which apply also to policies expressly declared to be for the benefit of the principal, and not professing to be upon any interest of the agent or factor, who effects them. But can they be applicable to this contract? It surely could not be necessary to the validity of this insurance, that these factors should insert the names of their principals in the policy. Such a requisition could subserve no valuable purpose, and would be embarrassing in the extreme, and oftentimes impracticable. An insurance like the present, is for the protection and indemnity of the commission merchant, against loss or damage to any goods or merchandise, that may then belong to him, or be held by him for sale on commission, as the factor of others. And it cannot be foreknown whose goods will be there at that time. The insurers, therefore, admitting them to be entitled to notice of the names of individuals intended to be benefited by the policy in ordinary cases, have dispensed with it in this case, by becoming parties to a contract which necessarily precludes the disclosure. But there was no difficulty in stating the insurance to be for the benefit of whomsoever it might concern. If the contract could be viewed

gain with the expected goods, though not consigned expressly to him, were considered advantages which certainly would accrue to him except for intervening perils in the cause of the transportation of the merchandise.[1] By the same construction a commission merchant to whom the cargo of a vessel is consigned, has an interest in his expected commissions, and may insure the same while the same is on the voyage.[2] In

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simply in the light of an insurance for the use of the plaintiffs and others, for whom they acted as agents, some general expression might be requisite to extend its protection to the assured, who were not specifically named in the policy. But this is an insurance by factors, upon goods held by them on consignment for sale; and even if the law did require, as a general rule, that such insurances should be for the account of the principals, and that to render the contract available to them, the factor must adapt his policy to the form prescribed for other agents, this contract appears to me to dispense with that condition; or, rather, to require a substitute for it, which probably was supposed to be of greater value to the insurer. By the third article of the conditions subjoined to the policy, and made part of it, goods held in trust, or on commission, are to be declared and insured as such, otherwise the policy will not cover such property. Can the sense of this provision be misunderstood? Does it not import, that if the condition be complied with, by the disclosure to the insurers, that goods held on commission are to be the subject of the insurance applied for, the property shall be covered by the policy? And if such be the true construction of the clause, it amounts to an agreement, that all the goods in which the assured should be found to have either an absolute interest as owners, or a qualified property as factors, should be covered by the policy, and the satisfaction, in case of loss, be made to the assured, as representing the entire interest in them." "I am unable to perceive any ground, (adds Mr. Justice Oakley,) in principle or good sense, why this contract (contract of insurance) ought not to be viewed in the same light with the contract of sale; and why the factor may not in the one case, as much as in the other, be considered as the owner of the property, for the purpose of entering into the contract, or of recovering damages for the breach of it. The effect of a sale of goods, by a general factor, although he acts against his secret instructions, is founded on the custom of merchants, and in the safety and convenience of commerce. It is equally important that such a contract of insurance as the present, should be supported on the same grounds."

[1] Grant *v.* Parkinson, 23 Geo. 3, in B. R. cited in Park on Ins. 267, and 1 Marsh. on Ins. 97; 3 Bos. & Pull. R. 85.

[2] Putnam *v.* Mercantile Ins. Co. 5 Met. (Mass.) R. 386.

delivering the opinion of the court in this case, Hubbard, J., said, "Originally, the owners of the vessel and cargo, and the designated voyage, were alone the subjects of the contract; but, as commerce has been extended, the rights of persons, other than those of the specific owners of the property, have become involved in the results of the voyages. In consequence of it, the law of insurance has been most reasonably extended to embrace within its provisions cases, where the parties, having no ownership of the property, have a lien upon it, or such an interest connected with its safety and situation, as will cause them to sustain a direct loss from its destruction, or from its not reaching its proper place of destination. Such rights have received protection." In another case in Massachusetts,[1] the insurance was on profits on merchandise, and it was held, that the assured had a substantial interest in the risk;[2] for if the ship had arrived safely, he would have been entitled to profits; and they depended on her safe arrival. Put-

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[1] French *v.* Hope Ins. Co. 16 Pick. (Mass.) R. 397.

[2] A supercargo, who is to receive compensation out of a homeward cargo, as he begins to render his services at the commencement of the voyage, and so continues them, sustains an absolute loss of his time and skill in case the cargo does not arrive; and, therefore, his interest is strictly a contract of indemnity. 1 Phill. on Ins. 115; Robinson *v.* New York Ins. Co. 2 Caines, (N. Y.) R. 357. But the supercargo, *as such*, has no possession of the goods or power over them during the voyage; his trust is to sell in the foreign market, and his duty commences on the arrival of the ship. The power to insure against maritime risks, is not within the scope of his authority, and does not result from any necessity. But where the goods are landed, and his instructions require him to wait for a market, and in the exercise of this duty, it becomes necessary to warehouse the goods; in such case, the right to insure the goods against fire, if deemed advisable, results by necessary implication from the power to retain the goods in store, and the consequent hazard to which they are exposed. By Jones, C. J., in De Forest *v.* Fulton Fire Ins. Co. 1 Hall, (N. Y.) R. 84. By an insurance on property on board a ship, effected in behalf of the master of the ship, whose only interest on board was his *commission* of seven and a half per cent. on the cargo homeward, such commission is insurable. Holbrook *v.* Brown, 2 Mass. R. 280; Wells *v.* Philadelphia Ins. Co. 9 S. & Rawle, (Penn.) R. 103.

nam, J., who delivered the opinion in this case, says, — "The objection principally relied upon is, that the plaintiff was not the owner of the merchandise; that he could not have insured the goods, and *à fortiori* not the profits on the goods which did not belong to him. The rule, if received to the extent laid down, would prevent the insurance of commissions on goods consigned to the plaintiff. If in the case of a consignee, the goods should arrive safely, he would be entitled to commissions on the sale. So in the case at bar, if the goods had arrived, the plaintiff would have realized a profit. The cases seem to us to be perfectly analogous. In each the party claiming profits or commissions has either to run the risk and bear the loss himself, or get insurance against marine risk. In each case, *he has a real interest* to protect." But if A., in England, contracts with B., at St. Petersburgh, to send him a cargo of merchandise on a credit; and the merchandise is shipped, and A. effects an insurance, and B.'s agent stops the goods *in transitu*, (A. having become insolvent,) neither A. nor his assignees can recover on the policy, inasmuch as A., after the stoppage *in transitu*, has no insurable interest.[1]

§ 77. It is an old doctrine, that every *bailee* has a temporary qualified property in the things of which possession has been delivered to him by the bailor; and by virtue of the delivery of goods to a *common carrier* for transportation, he has in them a special property which, in the first place, authorizes him to maintain an action against any person who disturbs his possession of, or does any injury to, them during their transit, or while in his custody; and he has moreover a *lien* on the goods as a satisfaction for his labor, or for the recovery of freight; and a right of action also for the freight after the goods have been delivered. Although, therefore, a carrier by sea cannot effect an insurance against the perils of the navigation, from the consequences of which he is exonerated by the

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[1] Clay *v.* Harrison, 10 B. & Cress. R. 99.

bill of lading, yet an inland carrier in whose favor no such exception is usually made, will in general have an insurable interest and a right to provide an indemnity against such accidents to the property placed in his hands, as will render him liable under his contract. Thus, it was held, that common carriers along the line of a canal, had an insurable interest to the full value of all the goods placed in their hands, which they might protect, under the general words of insurance ordinarily employed.[1]

§ 78. In Van Natta *v.* Mutual Security Insurance Company, in the Superior Court of the city of New York,[2] the objections made by the counsel to the doctrine in the preceding cases of De Forest *v.* Fulton Fire Insurance Company, and of Crowley *v.* Cohen, were briefly noticed by Sandford, J., in giving the judgment of the Court, and they were overruled; the Court deciding, that, in a declaration upon a policy of insurance on the cargo of a canal-boat, it is a sufficient averment of the plaintiff's interest to allege that the insurance was for the account and benefit of the plaintiff, as common carrier; and that it is a sufficient averment of the liability incurred, for the plaintiff to state, in such declaration, that an amount of goods exceeding that mentioned in the policy was intrusted to him as carrier, and that they were consumed by fire, and that the plaintiff thereby became liable to pay to the respective owners a greater sum than that insured.[3]

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[1] Crowley *v.* Cohen, 3 B. & Adol. R. 478, and cited in 2 Am. Lead. Ca. 437.

[2] Van Natta *v.* Mutual Security Ins. Co. 2 Sand. (N. Y.) Sup. Co. R. 490.

[3] Before Oakley, C. J., and Vanderpool and Sandford, J's. The reader will bear in mind that it is part of the law of common carriers, that a loss of the goods taken by them to transport, by fire through *misfortune*, and not by the act of God, falls upon them. See Angell on the Law of Carriers, § 156 – 160. Whether a count in a declaration can be supported by evidence of the special interest, as a common carrier, is a separate question from the one decided in the above case. See Granger *v.* Howard Ins. Co. 5 Wend. (N. Y.)

§ 79. It is laid down to be very clear, that one may insure, in his own name, the property of another for the benefit of the owner, without the latter's *previous* authority or sanction; and that it will enure to the party's interest intended to be protected, upon his *subsequent* adoption of it, even after a loss has occurred.[1] Where a ship bound to foreign parts was insured by one, having no personal interest in her, in his own name and for every person to whom the same appertained, and this was done without the previous authority of the owner, for whose interest the insurance was effected, and without his sanction before the loss of the ship, and he afterwards adopted the policy; it was held that he was entitled to recover directly against the underwriter.[2]

§ 80. The above doctrine was recognized as applicable to

R. 200. Should a carrier insure for the full amount of the property delivered to him to be carried, and receive it, he will be liable in an action for money had and received, for the excess, after satisfying his demand upon the property, at the suit of the real owners. Sidaways *v.* Todd, 2 Stark. R. 400; Armitage *v.* Winterbottom, 1 M. & Gr. R. 130; De Forest *v.* Fulton Fire Ins. Co. 1 Hall, 114. A carrier may insure the goods he contracts to convey; yet he has neither the legal title, nor the beneficial interest in them, but he is responsible for their loss. His insurance is upon the goods; yet his indemnity is against the consequences of his implied guaranty for their safe carriage, and not against the loss of the property by the peril insured against. Ibid. By Jones, C. J.

[1] Miltenberger *v.* Beacom, 9 Barr, (Penn.) R. 198. If a person authorizes insurance to be made, and desires it to be made for *his* account, this is not a direction to insure his own individual interest, but merely that credit is to be given to him for the premium, and the person for whose benefit the insurance was made, and who at the time had an insurable interest in the property, though ignorant of it at the time, may adopt it. Routh *v.* Thompson, 13 East, R. 274. Hughes, in his Treatise on Insurance, p. 41, says, that the insurance being for the benefit of the owner, the reasonable presumption is that he would adopt the act; and although he was under no *legal* obligation to repay the premium to the party negotiating the policy, there was such a *moral* obligation as furnished a sufficient consideration to support his adoption of it, after the happening of the loss.

[2] Hagedorn *v.* Oliverson, 2 Man. & Sel. R. 485.

fire policies in two instances in the State of Alabama. In the first, the policy was on the goods in the defendant's store, without discrimination; but it appeared, that the plaintiff's goods, which had been deposited with the plaintiff for sale, were included in the list of goods insured; and the defendant, after the loss, promised to account with the plaintiff for a just proportion of the subscription. On the trial, the defendant requested the court to instruct the jury, that if no instructions to insure were given by the plaintiff, when the goods were deposited or before the fire, the goods were not covered. This request was denied; and, on error brought, this refusal was sanctioned by the Supreme Court of the State, the court saying that the case was properly put on the ground, that the defendant's promise to account, contained an admission that he had insured for and on account of the plaintiff.[1] In the second case, A. effected insurance on goods, and in the policy, described them as "owned by himself, *held in trust*, or *on commission*," and, on their destruction received the amount for which they were insured; and he was held to be the agent or trustee of B., whose goods were part of those described in the policy, and which had been deposited with A. for sale; and that B. could recover his proportionate ratio of the amount so received. In such a case as this, it was held to be not necessary that an original authority should have been given to insure, or that it should be adopted prior to a loss.[2] In giving their opinion, the court used the following language — "Inasmuch as the insurance was effected by the defendant, not only as an individual owner, but as 'trustee or agent on commission,' he constituted himself the representative of the entire interest insured, but claimed not as the sole proprietor of it. The particular expressions of the policy in this respect, are not disclosed by the record; yet we are left to infer that such also was its import. The defendant having, under these circumstances, received the amount at which the

[1] Dourand *v.* Thouron, 1 Port. (Ala.) R. 238.

[2] Watkins *v.* Duraud, 1 Port. (Ala.) R. 251.

policies were valued, he was responsible to his *cestui que trust*, or principal, for his due proportion of the amount received, unless the latter has forfeited his right, by refusing to allow the premium, by disclaiming the policy, or by refusing to adopt it in proper time. We have seen that in such cases, the assent and adoption of the person benefited by the policy, may be declared after the loss, and is, therefore, to be presumed, at least for a reasonable time. Having the right of adoption against the underwriter, it can be no less against the trustee or agent who has received the money."

§ 81. But no person can, by any subsequent act, entitle himself to claim the benefit of an insurance made by another, if it appears that his interest *was not intended to be embraced by it*, when it was made; for a policy effected by a person who has himself no interest to be insured, and who at the time does not intend it for the benefit of any one who has, is a gambling policy. Insurance was made on a box of jewelry by the Pennsylvannia Insurance Company for A., "as well in his own name, as for and in the name of all and every other person and persons to whom the property insured does, may, or shall appertain." In an action against the company, evidence was given that the plaintiff had purchased certain jewelry and shipped it on board a vessel in a box; but no evidence was given of any intercourse between A. and the plaintiff, or of any agency on the part of A. in purchasing or shipping it, or at the time of obtaining the insurance, he had any intention of insuring for the plaintiff. It was held, that in the absence of such evidence, the judge who tried the cause was right in directing the jury to find for the defendants.[1]

§ 82. If the assured aver an entire interest in himself in

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[1] De Bolle *v.* Pennsylvania Ins. Co. 4 Whart. (Penn.) R. 68. Factors have the power to insure for the owners without special authority. Atlantic Marine Assur. Co. *v.* Louisiana State Ins. Co. 8 Carr. (Louis.) R. 1.

the subject insured, such averment cannot be supported by evidence of a joint interest with others; nor can the averment of a joint interest with others be supported by proof of a sole interest.[1] And one tenant in common, *merely in virtue of such relation*, has no right to cause insurance to be made on property for his co-tenant; nor has the master of a vessel, *merely as master*, a right to procure insurance for the owners.[2] But where the insurance is on property "for whom it may concern," or for the "owners" generally, in a marine insurance, it may be shown by extrinsic evidence, that the intention of the policy was to cover separate or joint property, or both.[3]

§ 83. We have seen,[4] that a person by becoming an insurer of property, thereby acquires an insurable interest in it; so that he may protect himself against the consequences of the risk he has been induced to assume by an insurance against it, which is termed a *re-insurance*.[5] In this particular no difference exists between Marine and Fire Insurance; in neither case is it a *wager* contract, and in both cases the first insurer becomes entitled to a complete *indemnity*. It has nevertheless been deemed advisable in England to forbid the use of it by statute; yet in the absence of any such prohibitory legislative act there is no doubt of its validity, and it has so been considered in this country.[6] The Supreme Court

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1 Catlett *v.* Pacific Ins. Co. 1 Wend. (N. Y.) R. 561; S. C. 1 Paine, (Cir. Co.) R. 615; Foster *v.* United States Ins. Co. 11 Pick. (Mass.) R. 85.

2 Foster, &c. *ubi sup.*

3 Ibid.; French *v.* Backhouse, 5 Burr. R. 2727.

4 Ibid.

5 See *ante*, § 24.

6 For the nature, meaning, and object of re-insurance, see *ante*, § 24, 25. By Mr. Justice Sandford: "For more than two centuries, the contract of re-assurance has been well known, and its principles firmly established; and we have not met with a single treatise or decision, which deviates from the uniform doctrine maintained on the point in question. From *Le Guidon de la Mer* to the last edition of Mr. Justice Park's work in England, and the publication of M. de Alauzet, in France, the contract of re-assurance is

of New York, in the case of The New York Bowery Fire Insurance Company *v.* The New York Fire Insurance Company,[1] have held, that under the general powers to make contracts of insurance, and all kinds of insurance, an insurance company is authorized to make re-insurance, which operates not upon the *risk*, but upon the *property* covered by the original policy. An underwriter may wish to change his business or he may have taken a greater risk on a particular subject, or in the same immediate neighborhood, than he is willing to encounter. In these, as well as in other cases that might be suggested, there is no principle of public policy which forbids him to sell an indemnity by means of a re-insurance, either in whole or in part, on the same risk. Should this contract be perverted to improper uses, as is said to have been the case in England, the legislature may interfere in this country, as it has in that, and prescribe the cases in which re-insurance shall not be permitted.[2]

§ 84. The contract of re-insurance, then, is one of *indemnity;* that is, the insurer is to be protected by the re-insurer, to the extent of his loss. But when the loss is incurred, the re-insurer, by the positive terms of the contract, is to pay the amount to the insurer within the time stipulated, after the same is ascertained and proved. The re-insurer has nothing to do with the payment by the insurer. In the French policies, both to relieve the insurer from the trouble of going through all the proofs on a trial, and to save costs to the re-insurer, it has become customary to insert a provision, that the re-insurer shall pay, on proof of payment by the insurer;

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described as a contract of *indemnity* to the *party obtaining it;* and in all the modern treatises such indemnity is explicitly declared to be the whole sum re-insured." Hone *et al.* receivers of the American Mutual Ins. Co. *v.* Mutual Safety Ins. Co. 1 Sand. (N. Y.) Sup. Co. R. 137.

[1] New York Bowery Fire Ins. Co. *v.* New York Fire Ins. Co. 16 Wend. (N. Y.) R. 359.

[2] See *ante*, § 25.

and it is to this provision that M. de Alauzet refers.[1] But in France, when there is no such clause; and uniformly in this country, where it is as yet unknown, the insurer may at once resort to his action against the re-insurer and recover the loss with the costs of litigation. There is no authority for saying, that he must pay the loss before enforcing the demand against the re-insurer.[2] In Hastie *v.* De Peyster,[3] the insurer had stood out a suit against him by the first assured, and it is inferable from the points raised, that he had paid the recovery; the language of Chief Justice Kent and of Livingston, Justice, is unequivocal, that he may recover, not what he has paid, but all that he ought to pay, or has become liable to pay. So it is laid down by Marshall, that if the original insurer fail, so that his assured receive only a dividend, however small, the re-insurer can gain nothing by this, but must pay the full amount of the loss to the first insurer; and this, he adds, stands the law in most of the maritime states of Europe.[4]

§ 85. A clause inserted in a fire policy of re-insurance, providing that in case there is any other insurance, prior or subsequent, on the property insured, the re-insured shall be entitled to receive, in the event of a loss, only a proportionate part thereof, refers to a *double* insurance on the *same interest*, or, in other words, to a double *re-insurance;* and, therefore, where there is no other re-insurance, the re-insurer, notwithstanding such a clause, is liable in the event of a loss, to pay the full amount thereof, if it do not exceed the sum mentioned in his contract.[5]

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[1] Alauzet, Traité General des Assurances, No. 152, p. 276. And see *ante*, § 24, 25.

[2] Opinion of the court by Sandford, J., in Hone *et al.* Receivers of the American Mutual Ins. Co. *v.* Mutual Safety Ins. Co. 1 Sand. (N. Y.) Sup. Co. R. 137.

[3] Hastie *v.* De Peyster, 3 Caines, (N. Y.) R. 190.

[4] 1 Marsh. on Ins. 143. And see *ante*, § 24, 25.

[5] Mutual Safety Ins. Co. Plaintiff in Error *v.* Hone *et al.*, Receivers of the American Mutual Ins. Co., Defendants in Error 2 Comst. (N. Y.) R. 235.

§ 86. If, in a policy of re-insurance, the underwriter agrees to "re-insure," and to "make good unto the re-assured all such loss or damage (not exceeding the sum specified,) as shall happen by fire, the loss or damage to be estimated according to the true and actual cash value of the property at the time the same shall happen;" the contract imports on its face that the re-insurer is to make a full indemnity within the amount of risk taken by him; and, provided there is no ambiguity in the terms used, evidence of a local custom among insurers to pay only such a proportion of the loss as the amount of re-insurance bears to the original policy, cannot be received to control the contract, or reduce the amount of a recovery thereon. The proof proposed, of such an usage, is rejected because it goes to contradict the plain and unequivocal language of the policy; and is not offered with a view to ascertain the meaning of particular terms to explain the subject of the contract; it goes to vary and contradict the contract.[1]

§ 87. Bell, after stating that the insurer has himself an insurable interest which he may protect by a re-insurance, says, — "This transaction, in the event of the *original insurer's insolvency*, the person originally insured has no interest in, and cannot recover from the last insurer in any other way than in common with the other creditors of the first insurer."[2] In a case in the Court of Chancery in New York, it appeared that the American Mutual Insurance Company insured the complainants $22,000, upon merchandise and other property in a store in Broad street, in the city of New York, and afterwards caused itself to be re-insured to the amount of $10,000, by the Mutual Safety Insurance Company, upon the same risk. During the running of these policies, the property was destroyed by the great fire in July, 1845. The American Mutual Insurance Company having become insolvent, in

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[1] Ibid.; and see as to usage, *ante*, § 23–27.

[2] 1 Bell, Law Dict. 403, Art. "Insurance."

consequence of losses occasioned by that fire, the question presented by the bill in the cause was, whether the complainants had an equitable lien, or preferable claim, upon the fund of $10,000, due upon the re-insurance, or whether that fund belonged to all the creditors of the insolvent company ratably? Chancellor Walworth decided that where an insurance company has underwritten a policy, and afterwards causes itself to be re-insured, and after the loss of the property insured, such company becomes insolvent, the person originally insured has no equitable lien upon the sum of money due on the contract of re-insurance; but that fund belongs to all the creditors of the insolvent company ratably.[1]

§ 88. A re-insurance, we have seen, differs very essentially from a *double* insurance.[2] The latter occurs when several policies are effected for the benefit of the *same person*, and upon the *same subject-matter;* whereas the former is entered into by the insurer for his own protection. There is no illegality in England, in the practice of the latter, as it appears there is by statute in the former; nor is the latter prejudicial, in its ordinary effects, to the assured, or to the insurer. To the assured it is attended with advantage as it provides with greater certainty for the protection of the whole amount of his interest; and the several underwriters on different policies being in the nature of *co-insurers*, he is enabled to select any whose responsibility he may prefer for satisfaction of the amount of his loss. No inconvenience, on the other hand, is sustained by an underwriter in the case of a double insurance, for his contract is not varied by it; and if the underwriter in one policy should pay the whole amount of the loss, he would be entitled to recover a *ratable* contribution from the underwriter in the other policy.[3] The principle of contribution has

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1 Herckenrath *v.* American Ins. Co. 3 Barb. (N. Y.) Ch. R. 63.

2 See *ante*, § 26.

3 Gordon *v.* London Assur. Co. 1 Burr. R. 492 — opinion of Lord Mansfield; Hughes on Ins. 59; Park on Ins. 422; Bousfield *v.* Barnes, 4 Campb.

its foundation in the clearest principles of natural justice; for as all are equally bound, and are equally relieved, it is obviously but just that, in such a case, all should contribute in proportion towards a benefit obtained by all. Any other rule in case of double insurances, would put it into the power of the assured to select his own victim; and upon motives of mere caprice or favoritism to make a common burthen a personal oppression.

§ 89. It is generally a condition of the policy when the same property is insured with several insurers, that the assured shall give notice of any other insurance on the same property;[1] one of the objects of which is to apprise the insurer of his claim to contribution from his co-insurers.

§ 90. Where there is a clause in a policy of insurance, that persons at that office must give notice of any insurance *made* on their behalf by the same, and shall cause such other insurance to be indorsed on their policy, in which case each office shall be liable to the payment only of a ratable proportion of any loss or damage which may be sustained, and unless such notice is given, the assured will not be entitled to recover in case of loss, the condition applies to a *subsequent*, as well as to a *prior*, insurance.[2]

§ 91. A policy of insurance contained a stipulation, that if the assured then had, or thereafter should have any other insurance upon the same property, notice thereof should be given to the company, and the same indorsed upon the policy, or otherwise acknowledged by the company in writing. A bill was filed by the assured against the company alleging

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R. 228; Stacy *v.* Franklin Fire Ins. Co. 2 Watts & S. (Penn.) R. 506; Peters *v.* Del. Ins. Co. 5 S. & Rawle, 475.

[1] Beaum. on Ins. 56.

[2] Stacey *v.* Franklin Fire Ins. Co. 2 Watts & S. (Penn.) R. 506; Harris *v.* Ohio Ins. Co. 5 Ham. Ohio, R. 461.

that notice was given of another insurance, and praying that the company might be compelled to indorse the notice upon the policy, or acknowledge the same in writing; but the proof of the notice being insufficient, the bill was dismissed with costs. "If," said Woodbury, J., who delivered the opinion of the court, "the plaintiff omitted to comply with so *substantial* a provision in the contract itself, we see no way, equitably or legally, to prevent the consequences falling on himself, rather than others, being the result either of his own neglect, or that of some of the agents he employed."[1] If notice is given to an agent of the company, or to one empowered to make surveys and to receive applications, it is sufficient.[2]

§ 92. To secure from, and on the part of, the owner, due care and vigilance over the property insured, it is the practice of fire insurance companies to cover by their policies a part only of the loss. They secure no property for its full value, or for an amount greater than the value, because it is found necessary to guard against negligence on the part of the assured, and sometimes against his dishonesty. It is necessary also, for the same reason, to provide, that the assured shall not effect other policies at his pleasure, upon the same property, in other insurance companies. The subject is considered of so much importance, that it is provided in the *act of incorporation* of some companies, that if insurance on any building insured by the company, shall subsist at the time in any other office, the insurance by the company shall become void, unless such double insurance subsist with the consent of the directors or agents, signified by indorsement on the back of the policy, signed by the president and secretary.[3]

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[1] Carpenter *v.* Providence Washington Ins. Co. 4 How. (U. S.) R. 185.

[2] Sexton *v.* Montgomery County Mutual Ins. Co. 9 Barb. (N. Y.) Sup. Co. R. 191.

[3] Stark County Mutual Ins. Co. *v.* Hurd, 19 Ohio, R. 149.

§ 93. Where by the *terms of the policy*, it is provided, that in case the assured shall already have any other insurance, not notified, the policy shall be void, and it is declared, that in case of any other insurance upon the property, whether prior or subsequent, there shall be only a *pro rata* recovery in case of loss, and one of the *conditions* attached to the policy is, that notice of all previous insurances shall be given at the peril of forfeiting the policy; it was held, that a purchaser of a dwelling-house, who effected insurance upon it, was not bound to give notice of a previous policy effected by his vendor, unless such previous policy was assigned to him.[1] The clause in the policy related only to a double insurance, and to constitute a double insurance, both policies must be upon the same *insurable interest*, either in the name of the owner of that interest, or in the name of some other person for his benefit.[2]

§ 94. In the case of Lucas *v.* The Jefferson Insurance Company, in New York,[3] a construction was given to the clause in a policy of insurance against fire, providing for only a ratable payment in case of other policies on the same subject. That company insured the plaintiff against loss by fire, to the amount of $4,000, on certain cotton and woollen machinery. The Chatham and Etna Fire Insurance Companies also insured the plaintiff on the same property, the former for $5,000, the latter $6,000; and a loss had been sustained by fire. The evidence, on the part of the plaintiff, made the amount of loss

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1 Etna Fire Ins. Co. *v.* Tyler, 16 Wend. (N. Y.) R. 385. "No one can suppose," said Chancellor Walworth, "for a moment, that these underwriters intended to be so unreasonable as to require a person insuring with them, under the penalty of a forfeiture of his policy, to give notice of every insurance which any former owner of the property might have made thereon, although he had no interest in that insurance, and the rights of the company could not in any way be affected thereby."

2 Mutual Fire Ins. Co. *v.* Hone *et al.* Receivers of the American Mutual Ins. Co., Defendants in Error, 2 Comst. (N. Y.) R. 235.

3 Lucas *v.* Jefferson Ins. Co. 6 Cow. (N. Y.) R. 635.

about $20,000; and that on the part of the company, between nine and ten thousand dollars. The policy underwritten by the company, contained the following clause: "*In case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall not, in case of loss or damage, be entitled to demand or recover on this policy, any greater portion of the loss or damage sustained, than the amount insured shall bear to the whole amount insured on the said property.*" The Chatham and Etna Companies had each paid the amount of their insurance, deducting one sixth, making together $9,583.34. These were voluntary payments without suit, by arrangement between the parties. It was held, that there was no contribution between policies containing the above clause. But where there are several policies and one only contains this clause, and the others pay to the extent of their subscriptions, which is more than their ratable share, this will be a defence *pro tanto*, in an action against the underwriters on the policy containing that clause; and if the policies, without the clause, have paid enough to cover the loss, it is a complete defence for the others; for they are liable to contribute to the underwriters who have paid. Where there are several policies on the same subject without the clause in question, it is a double insurance; they are all deemed but one policy; the assured can recover but one indemnity, and contribution prevails between the insurers.

§ 95. There is one other species of insurable interest referred to in the books, namely, a policy effected by the assured upon the *solvency of the insurer;* a species of contract which appears to have prevailed in some countries on the continent of Europe;[1] though it has never obtained admission in practice in England; the same protection being afforded by a double insurance.[2]

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[1] Emerigon on Ins. c. 8, s. 15.

[2] Hughes on Ins. 60.

CHAPTER V.

THE EXTENT AND NATURE OF THE INSURER'S RISK.

§ 96. First: As to the *kind* and *amount of the property designated, embraced or covered by the policy.* The contract of insurance is to be construed liberally, and according to the intention of the parties, and whether a specific commodity, or building, is covered by a policy, must be inferred from the general scope of the policy.[1] The collocation of words, it is obvious, may affect their meaning, of which the case of Watchorn *v.* Langford, affords an illustration. In that case, which was an action on a policy of insurance, the plaintiff, a coach-plater and cow-keeper, insured his "stock in trade, household furniture, *linen*, wearing apparel, and plate," against fire for one year. A fire happened within the year and consumed, among other things, a large stock of *linen drapery* goods, which he had purchased a short time before on speculation, and which, it was contended, were protected by the policy under the denomination of "linen." But Lord Ellenborough was clearly of opinion, that that word in the policy did not mean linen drapery; that it being preceded by the words "household furniture," and succeeded by "wearing apparel," must mean *household linen* or apparel.

§ 97. A first insurance by a fire insurance company was upon "merchandise generally, including liquors and groceries contained in store No. 37, South Wharves, for use of whom it may concern; say merchandise without exception;" and

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[1] *Ante*, p. 47, § 12; Ellis on Ins. 27; Diggs *v.* Albany Ins. Co. 10 Barb. Sup Co. R. 440.

[2] Watchorn *v.* Langford, 3 Camp. R. 422; and see following chapter.

a second insurance was made by another company on coffee and other merchandise without exception "either on board the J. S. in this port, or in the brick store, No. 37, South Wharves, in the city of Philadelphia." A loss happened by fire on goods in the store, not brought in the J. S., or landed therefrom. It was held, that there was not necessarily a double insurance,[1] but the first might be on goods generally in the store, and the second on specific goods merely, brought in the J. S. or landed therefrom.

§ 98. It is sufficient if the description of the property substantially defines and ascertains the property intended. Thus, where goods were described as "in the dwelling-house" of the assured, and it turned out that the assured had but one room, *as a lodger*, in which the goods were, it was held, that they were correctly described within a condition that "the houses, buildings, and other places where goods are deposited, shall be truly and accurately described;" such condition relating to the construction of the house, not to the interest of the parties in it.[2] Again, where some agricultural buildings in an open field, of such a nature that they would have been insured by the company at the same rate as a "barn," but of which that term would not be a strictly appropriate designation, having been stated in the policy to be "a barn situate in an open field, timber built and tile;" Lord Tenterden, C. J., held, that, although it was not the most correct description of the premises, still, as it gave the company substantial information of their nature, and there would be no difference in the premium, it was sufficient.[3] If a building be described as of one class, instead of another, when a larger premium would have been required for that other, the policy becomes completely void.[4]

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1 Stacey *v.* Franklin Ins. Co. 2 Watts & S. (Penn.) R. 506. As to double insurance, see *ante*, § 88, *et seq.*

2 Friedlander *v.* L. A. Comp'y, 1 M. & Rob. R. 171; Ld Tenterden, C. J.

3 Dobson *v.* Sotheby, 1 M. & Mal. R. 90.

4 Smith, Mer. Law, 404, citing New Castle Fire Ins. Co. *v.* M'Moran, 3 Dow. R. 255.

§ 99. On a construction of a policy against fire, effected on ship-builder's stock of *timber*, "contained in the yard bounded by" three specified streets and the river, (in the city of New York,) proof was received to the effect, that it was usual for the owners of ship-yards in that city, to keep their stock of timber on the sidewalks, and in the streets in the vicinity of their yards, as much so as within the yards. Some of the timber of the assured lay across the sidewalks, partly on the street and partly on the land of the assured, which was only partially fenced. It was held, that the evidence was properly received to show what was the meaning of the terms "stock of timber in a ship-yard," as used by the parties in the policy, and to define the term "yard" of a ship-builder; and that, (there being no contradictory evidence,) the assured was entitled to recover for the loss of his timber lying in the streets adjacent to his land.[1]

§ 100. But the stock of a baker, insured, and described as being "contained in a framed dwelling-house and bake-house, *front* and *rear*, situate at No. 17 Thames St.," will not enable the assured to recover for the flour stored in a *shed* leading from the bake-house to the front house.[2]

§ 101. A factor or commission merchant, who has the consignments of the merchandise of several employers, may cover the whole with one insurance in the name of the consignee who has the actual possession and charge of the whole, and the same special property in all. The form now in use is a general policy, in the name of the commission merchant, on *all the goods* that may be in his warehouse *at any time*, within a given period to a specified amount, whether held by him as owner, or in trust, or on commission. Under such a contract the insurers will be answerable for loss or damage by fire,

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[1] Webb *v.* National Fire Ins. Co. 2 Sand. (N. Y.) Sup. Co. R. 497; and see Park on Ins. 285.

[2] Moadinger *v.* Mechanics' Fire Ins. Co. 2 Hall, (N. Y.) R. 490.

within the terms of the insurance, to whatever merchandise or property may happen to be in the warehouse at the time of the fire, and be then held by the assured, as general or special owner, without regard to the time of his receipt of the goods in store, or the persons who may be interested in them. A policy thus made, cannot be considered as attaching specifically and solely on the goods in the hands of the factor at the date of the policy; for it will, and must, often happen, that no part of the specific goods, originally covered by the policy, is exposed to loss, when any fire may take place. The goods of A. which occupy a place in his warehouse, at the present moment, may be sold before the close of the day, and the goods of B. take their place to-morrow, and in the course of thirty days, as many different lots of merchandise may have had the shelter of his warehouse, and have been exposed for different periods of time to the risk by fire therein.[1]

§ 102. It appeared in a case in the Supreme Court of Louisiana, that the sum of twenty thousand dollars was insured on cotton that might be located in seven named places, and that cotton to the value of seventeen thousand dollars was burned in one of those places, at the same time that cotton belonging to the assured was stored in one of the other of the places named, making with that which was burned an aggregate value of more than twenty thousand dollars; and it was held, that the assured was entitled to recover the full sum lost, and not an average sum proportioned to the sum which they had insured as compared with the whole property at risk.[2]

§ 103. The terms "stock in trade," as used in a policy, in reference to the business of a *mechanic*, (a *baker* for instance,) have a more extended meaning than their ordinary application to the business of *merchants*. In a case in the Superior Court

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[1] De Forest *v.* Fulton Fire Ins. Co. 1 Hall, (N. Y.) R. 84; Millaudon *v.* Atlantic Ins. Co. 8 Louis. R. 557; and see *ante*, § 75.

[2] Nicolet *v.* Ins. Co. 3 Louis. R. 371.

of the city of New York,[1] it appeared, that the plaintiff was a *baker*, carrying on business in a limited way, and that he had obtained insurance for $1,000 on "his stock in trade," as a "baker." The action was brought to recover the amount of a loss sustained by a fire which afterwards took place. On the day of the fire, his whole stock of *bread* was upon his cart, and he contended, that in order to give effect to the intention of the parties,[2] his fixtures and implements of business, must be considered as covered by the policy. The court were of opinion, that the policy protected every thing which was necessary for the carrying on of the business of a baker; and that such should be the construction in *all* cases relating to the *pursuits of mechanics;* that the construction contended for by the insurance company, was altogether too narrow, and would, in many instances, entirely defeat the principal objects of insurance; that the meaning of the terms used, will vary according to the business to which they are applied; the stock of a *merchant*, comprehending articles entirely different from the stock of a *farmer;* but the terms, in all cases, apply to *personal* property only.

§ 104. On the principle, that such a construction is to be given to a policy of fire insurance as will make the indemnity coextensive with the risk, it has been held, that where such policy is for *eighteen hundred* dollars on a grist-mill and *seven hundred* dollars on machinery therein, and is renewed in general terms for *twenty-five hundred* dollars without making any distribution of the risk; it is the intention of the parties, that the insurance shall thereafter be without any distribution of the risk; that it applies generally to both the building and the machinery.[3]

§ 105. "Coffee-House" is not properly within the expres-

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1 Moadinger *v.* Mechanics' Fire Ins. Co. 2 Hall, (N. Y.) R. 490.

2 See *ante*, § 100.

3 Diggs *v.* Albany Ins. Co. 10 Barb. (N. Y.) Sup. Co. R. 440.

sion "Inn;"[1] and the insurance of an innkeeper's "interest in the inn and offices," does not cover the loss of *profits* sustained between the time of the destruction of the inn by fire and its restoration. Not but that such profits are insurable, but they must be insured *as profits*.[2]

§ 106. The common and ordinary acceptation of the word "*house*," embraces every thing appurtenant and necessary to the main building; just as the sale of a house, carries with it, in legal acceptation, whatever may be necessary to a full and complete enjoyment of it. Therefore, where a house is insured, and it evidently appears from the payment of a premium commensurate with the entire value of the whole, a back building will be considered as accessary to the main building, and hence as embraced by the policy.[3]

§ 107. The enumeration of certain trades or kinds of business as prohibited on the ground of being "hazardous," is an admission, that all other kinds are lawful under the contract *Expressio unius, exclusio est alterius*. In Baker *v.* Ludlow,[4] *dried fish* were enumerated in the memorandum clause as free from average, *and all other articles perishable in their own nature;* and it was held, that the naming of one description of fish implied that other fish were not intended; and that the subsequent words, "all other articles perishable in their own nature," were not applicable to the articles previously enumerated, and did not repel the implication arising from the enumeration of them.

§ 108. In a policy of insurance against fire, the building

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1 Doe *d.* Pitt *v.* Laing, 4 Campb. R. 76.

2 Wright in re, 1 Ad. & Ell. R. 621. See *ante*, § 76.

3 Workman *v.* Ins. Co. 2 Miller, (Louis.) R. 507. See *ante*, § 100.

4 Baker *v.* Ludlow, Caines, (N. Y.) R. 288. See also the cases of Luckley *v.* Furse, 15 Johns. (N. Y.) R. 342, and Fensington *v.* Inglis, 8 East, R. 273, per Sutherland, J., in 6 Wend. (N. Y.) R. 620.

insured was described as a "brick building with a composition roof, occupied by several tenants, and connected by doors with an adjoining building, situate at the corner of Charles Street and the Western Avenue;" and it was held that the words "situate," &c., did not refer to the adjoining building. In this case, the only description which was inapplicable, and which appeared by the evidence not to be true, was the recital in the policy: "A cabinet maker's shop is in the same building." But the court did not doubt the propriety of rejecting a particular description, which is clearly false, in order to give effect to other descriptive words, when such words are sufficient to define the object intended to be described; and in such case, it was considered the false description might be rejected as surplusage. But say the Court — "The difficulty here is, that we are called upon to reject that particular part of the description, which is the most leading. If we reject this description, we have no other elements of description, sufficient to embrace any particular house as within the policy. Striking out the words 'situate at the corner of Charles Street and the Western Avenne,' we have no locality and no particular house insured. The matter stands thus as to the western house. Rejecting this particular in the description as false, and giving full force and effect to all the other parts of it, the description then is so substantially defective, that it cannot be held to apply to the particular house which the plaintiff says was insured. This view of the case precludes the plaintiff from recovering damages, for any loss he may have sustained in the destruction of the western house by fire." It was suggested, that the policy might be construed to embrace the whole block, that is to say, the two buildings, and thus avoid the difficulty in the variance of the description as to situation. But the court thought, that this could not have been the intention of the policy; the description clearly referring to one building, and that building connected by doors with the adjoining building; nor did the policy totally fail for uncertainty in the description.[1]

[1] Heath *v.* Franklin Ins. Co. 1 Cush. (Mass.) R. 257.

§ 109. SECONDLY: The insurer, in consideration of the premium paid, usually undertakes to pay or make good to the assured, all such damage and loss as he shall suffer by *fire*, (except loss or damage by fire happening by any *invasion*, *foreign enemy*, *civil commotion or riot*, or any *military* or *usurped power* whatever,) to the extent of the sum for which it is insured.[1]

§ 110. Upon this important branch of the subject, it may be proper to state *in limine*, that it is necessary in this, as in all other cases of insurance, that the subject-matter of the contract should, at the time when the liability of the insurer is incurred, be free from the damage insured against; which means, not only that the buildings or goods should not already have caught fire, but that fire should not be raging in an adjacent spot, from which it is probable it will communicate to the assured. On this ground, a policy was set aside in the case of Bufe *v.* Turner.[2] The insurer must be supposed to take the risk on the hypothesis that nothing unusual exists.[3]

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[1] Ellis on Ins. 24.

[2] Bufe *v.* Turner, 1 Marsh. R. 46; 6 Taunt. R. 338. It appeared at the trial in this case, that the plaintiff was possessed of two warehouses in Heligoland, one of which was separated by only one other building from the workshop of a boat builder, wherein a fire broke out on the 11th of July. That fire, however, was apparently extinguished in half an hour, and four persons were employed by the plaintiff, who was a magistrate there, to watch during the night, lest the fire should again break out. The plaintiff, in the same evening, wrote to his agent in London, requesting him to effect insurance against fire for three months at £400, upon the plaintiff's warehouse, (therein described,) as also upon the coffee in casks and bags, then stored in the same warehouse, value £3,500. The mail for England was to sail that day, and was then closed; but the plaintiff procured the master of a packet-boat to take the letter with him, and put it into the post-office at Cuxhaven, so that the letter left Heligoland at a late hour on the same night, and it reached England by the same packet on the 24th, and the

[3] Clark *v.* Manuf. Ins. Co. 8 How. (U. S.) R. 235; Currie *v.* Commonwealth Ins. Co. 10 Pick. (Mass.) R. 535; and see Beaum on Fire and Life Insurance, 39.

§ 111. The risk, as just before stated, mentioned in the policy, and protected by it, is "all such damage and loss as the assured shall suffer by *fire;*" which means damage caused by the *ignition* or actual *combustion*, (or where such is the *proximate* cause,) and not merely by the excessive heat of a furnace, or like receptacle of fire, or other usual means of communicating warmth. Thus in the case of Austin *v.* Drewe,[1] the owners of a sugar-house had insured their stock, which was damaged by the *intense heat* of a chimney running through the various floors, occasioned by the negligent omission of their servant to open the register at the top when the fire was lighted. This register was usually closed at night, for the purpose of retaining the heat in the chimney and warming the floors, which, in the process of refining, required to be kept at a high temperature. Upon the occasion in question, no part of the building or property was set on fire, but the sugars were injured by the extraordinary heat; and the court held this not to be a loss within the terms of the policy, as there had been no ignition of any foreign body. In this instance the clause, exempting the insurers from responsibility to make good losses arising from the *misapplication of fire heat* in the process of manufacture, does not seem to have been contained in the policy.

§ 112. The above case was cited and relied upon as authority in a case in Pennsylvania, which originated under a policy of insurance, in the fire at Pittsburgh, in that State, on

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plaintiff's agent, on the following day, effected the policy in question. Early in the morning of the 13th, a fire again broke out in the workshop of the boat-builder, and consumed the premises insured. The jury acquitted the plaintiff of any fraud, or dishonest design, the fire being apparently extinguished when he ordered the insurance, but thought that the circumstance of the fire on the 11th ought to have been communicated to the insurance company, who, without this information, did not engage on fair grounds with the plaintiff, and for whom, under these circumstances, they gave their verdict. A motion was afterwards made to set aside the verdict and have a new trial; but the Court refused the rule.

[1] Austin *v.* Drewe, 6 Taunt. R. 436; and see Dowd. on Life and Fire Ins. 100.

the 10th of April, 1845.[1] The question was, whether the injury sustained by the assured in the removal of his goods, was a loss within the policy, *his house* not having been on fire, and his goods not having been directly injured by the fire; but the fourth house from him was at one time on fire, (though afterwards the fire was extinguished,) and there was reasonable ground of apprehension, that his house would be consumed in that extraordinary conflagration. In this case, the fire, although it may be said to be the remote cause of the injury, the *causa causans*, it cannot properly be called the proximate cause. The property was not on fire, neither the house which contained it, nor were the goods injured by endeavors to extinguish the fire, or save them from it. The insurance was not against any *apprehensions* of fire, and the injury sustained originated, not from necessity to save them from impending fire, but from *anticipation* of damage from it.[2] By Gibson, C. J.— "Insurers are answerable for direct and immediate, not for consequential and remote losses, from a peril insured against. On no other principle, than that the character of the loss is determinable by the proximate cause of it, could the insurers have been liable for the loss of the Dutch ship mentioned in Marshall on Insurance,[3] as having been burnt by the Spaniards at Majorca, in consequence of an apprehension that the crew were infected with the plague. An inversion of the rule would have made them liable only in case the plague had been one of the perils mentioned in the policy. It would also have protected the insurers in the Patapsco Insurance Company *v.* Coulter [4] from liability for the loss of the ship burnt by the negligence of the captain and crew. But the converse of the rule, which charges the insurers with a loss, of which the particular peril is the proximate cause, exempts them where it is the remote one; and this rule

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[1] Hillier *v.* Alleghany County Mutual Ins. Co., 3 Barr, (Penn.) R. 470.

[2] See opinion of Grier, J., Ibid.

[3] Page 421.

[4] Patapsco Ins. Co. *v.* Coulter, 3 Peters, (U. S.) R. 222, cited *post*, § 123.

is a part of the general law of insurance, though I confess I have seen no application of it to any other policy than a marine risk, except in Austin *v.* Drewe,[1] which, however, comes entirely up to the point."

§ 113. The word "fire" should be construed in its ordinary signification;[2] that is, it should not be confined to any technical and restricted meaning, which might be applied to it by a scientific analysis of its nature and properties; nor should it receive that general and extended signification, which, by a kind of figure of speech, is sometimes applied to the term; but it should be construed in its ordinary and popular sense. Therefore in the case of live stock struck by *lightning*, the mark of fire must appear on the carcase; otherwise, it may be a case of death occasioned by the electric shock alone, which is not a loss by fire.[3] Such was the interpretation expressly given by Pratt, J., in delivering the opinion of the Supreme Court of New York, in the case of Babcock *v.* Montgomery County Mutual Insurance Company.[4] In this case, the policy of insurance was against loss or damage by fire, and one of the conditions was, that the insurers will be liable for "fire" by "*lightning*." The decision of the court was, that the underwriters were not liable for the destruction of the dwelling-house insured, by its being *rent* and *torn in pieces* by lightning, without being *burnt;* and that unless there be actual ignition, and the loss be the effect of such ignition, the insurers are not liable; there must be fire or burning which is the proximate cause of the loss.[5]

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[1] *Ante*, preceding section.

[2] 6 Bac. Abr. 658.

[3] Beaum on Ins. 37.

[4] Babcock *v.* Montgomery County Mutual Ins. Co., 6 Barb. (N. Y.) Sup. Co. R. 637.

[5] This being a point of much importance, we give the very learned and valuable opinion of Mr. Justice Pratt: "*First.* The plaintiff has the *onus probandi* upon himself. In order to entitle him to a recovery he must prove that the loss was occasioned by fire; and as the building was not consumed

§ 114. In a case in the Superior Court of New Hampshire,[1] it appeared that the act of incorporation of an insurance company constituted certain persons a body politic, "for the pur-

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nor set on fire, he must be able to show that electricity, of sufficient intensity to rend a building, is fire, in the popular and ordinary signification of the term. It is not sufficient to show that fire is one of its constituent principles. He must be able to demonstrate that the rending and destruction of the building were the result of that particular principle. That, I think, cannot be done in the present state of the science of electricity. It can neither be proved, that fire, in its ordinary signification, is a constituent element in electricity; nor, if that be so, that its mechanical or rending effects are the consequences of such fire. Of the actual nature of what we call electricity, but little is pretended to be known with certainty. It is even a disputed point among scientific men, who have made it the subject of their investigation, whether it be an actual fluid, or merely a property of other matter. (Ed. Ency. tit. Electricity.) The only real knowledge which we possess in relation to it is, a knowledge of its properties derived from observation of its effects. We find, that under certain conditions it exhibits phenomena or effects, which are the most wonderful, as well as the most powerful, within the observation of man. These phenomena are divided, by writers upon the science, into three classes, the mechanical, the chemical, and the magnetical; and some writers add a fourth, termed the physiological. (Ed. Enc. tit. Electricity; Sturgeon's Lectures on Elec. 124.) When the *fluid* (if we may be allowed the expression) is excited to a high degree of intensity, the mechanical effects of an electric discharge are manifested by perforating or rending any non-conducting substance, against which such discharge may be directed. Excited to a high degree of intensity, its chemical effects are also manifested by fusing metals, and igniting combustible substances. These effects belong to different classes of phenomena, and are, for aught we know, entirely distinct in their character. I have not been able to find any writer, nor was our attention on the argument directed to any author, who insists that the mechanical effects of electricity are produced by its calorific properties, except M. Arago. His theory was, that the explosive effects of lightning were caused by its heating properties upon the water and moisture contained in the subject of the explosion. But this theory has not been generally adopted. (See Lardner's Lectures, subject, Electricity.) Whilst it is admitted that nothing is absolutely known of the method by which heat is evolved in electric phenomena, the theory which is the most generally adopt-

[1] Kenniston *v.* Mer. County Mutual Ins. Co. 14 New Hamp. R. 341.

pose of insuring their respective dwelling-houses, with their contents, against loss or damage by fire, whether the same

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ed, makes it the result, and not the cause, of the mechanical action. (Ed. Enc. tit. Heat.)

"Mr. Sturgeon, an able and lucid lecturer upon the subject of electricity, suggests the existence of two separate fluids which pervade all matter — the electric and the calorific; that heat is evolved, and ignition produced, by the mechanical action of the electric fluid upon the calorific. (Stur. Lec. p. 162.) Without assenting to any of the numerous theories which have resulted from speculations upon the subject by men of science, I only allude to them to show that nothing is known with sufficient certainty to form a basis for legal adjudication.

"I may remark, in passing, that it is with a considerable degree of diffidence that I dissent from the positions taken by the learned jurist, Judge Willard, who has written an opinion upon the points involved in this case, and which was cited upon the argument. If I understand the position taken by him, it is that if the lightning had not torn the building to pieces, it would have set it on fire, and hence he deduces an argument in favor of holding the company liable.

"In the first place, I am unable to find any evidence that there was any such alternative in the case. The phenomena of nature are constant: like causes produce like effects; and there is no evidence that the electric fluid which demolished the house was, under the existing circumstances, capable of setting it on fire, or exhibiting any different phenomena from those which it did exhibit. In the second place, if it were so, it would not alter the case. The contract of the insurers was to indemnify the insured against loss by fire. It by no means follows that they are liable for the damage done by violence to the insured property, because the agent by which the violence was effected might have set it on fire. A heated ball or bombshell may injure the building against which it is hurled. It would not do to hold the insurers liable, because, if the force which caused it to perforate the wall had been less, or the resistance greater, it might have lodged in the walls and set them on fire.

"*Secondly.* If it could be demonstrated that the mechanical action of lightning is the result of its calorific properties, it by no means follows that the damage is occasioned by fire. The terms, caloric and fire, admit of very different significations. One is the cause, and the other the effect. That which is termed caloric seems to pervade every material substance. It may be evolved from a snowball or a piece of ice. Fire, on the other hand, is not an elementary principle, but is the effect produced by the application of

shall happen by accident, *lightning*, or by any other means." The terms of the policy sued on, were to pay, " within three

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heat, or caloric, to combustible substances. Walker says, that in the popular acceptation of the word, " fire is the effect of combustion." It is therefore equivalent to ignition or burning.

" Unless, therefore, there be actual ignition, and the loss be the effect of such ignition, the insurers are not liable. Not that the identical property to which the damage occurred should be consumed, or even ignited, but there must be a fire or burning which is the proximate cause of the loss. It is immaterial how intense the heat may be; unless it be the effect of ignition, it is not within the terms of the policy. The heat of the sun often contracts timber, from which losses occur; but they would not be considered losses by fire. (Ellis on Fire Ins. 273; Steph. N. P. 1079; 11 Petersd. Ab. 18.) Hence in the case of Austin *v.* Drewe, 6 Taunt. 436; 4 Camp. 360, it was ruled in the case of an insurance upon the stock of a sugar-house, that damage to the stock by the heat of the usual fires in consequence of the accidental mismanagement of the dampers, was not within the policy against loss by fire. Gibbs, Ch. J., ruled, and his ruling was sustained by the court, that if there was a fire, it was no answer to say that it was occasioned by negligence or misconduct of servants; but in this case there was no fire, except in the stove where it ought to be, and the loss was occasioned by the confinement of the heat, and not by fire.

" *Thirdly.* The terms of the policy exclude the idea that it was intended to cover damage by lightning when there was no ignition. The words of the policy are, that the company will be liable for fire by lightning. 1st. If the company intended to insure against all damage by lightning, it seems strange that they should have used that form of expression — that they had not used the phrase directly, 'damage or loss by lightning.' If the word fire includes in itself lightning, then one of those words was entirely superfluous. It seems obvious to me, therefore, when the parties to the contract make use of the term 'fire by lightning,' they use the term lightning, not as fire itself, but as an agent capable, under certain circumstances, of causing fire. 2d. The use of the same expression, in the books, strengthens this position; for the parties will be deemed to use the term in its legal acceptation. Ellis on Fire Insurance, p. 25, says, 'that it is sometimes expressly stated to remove any doubt, though little could exist, that losses occasioned by fire from lightning will be made good.' Kent, in a note to his Commentaries, third volume, edition 1836, says, that it has been usually held that losses by fire and lightning are within the policy. It is hardly probable that two writers so correct in the use of language would put in the word fire where it would be utterly

months next after the said property shall be burnt, destroyed, or demolished by, or by reason, or by means of, fire." The plaintiff claimed an indemnity as for a partial loss on his dwelling-house and its contents; and to sustain his claim, he offered evidence tending to show, that on a certain day his house was struck by lightning, and different parts of it materially injured, and also articles of crockery, glass, and tin ware broken or destroyed. He proved, also, that the boards and timber near one of the windows where the lightning struck, exhibited marks or traces of fire, being discolored, and rendered of a dark brown color, as if affected by a blaze of fire; and one witness testified, that he saw on these boards and timbers where fire burned, and that he had no doubt, that the house would have been burned had not water been admitted through the window which was broken out by the lightning. The only question made by the defendant was, whether the loss was covered by the policy, or act of incorporation. And by Parker, C. J., — "If the damage was from lightning, without any combustion, it is clearly not within the terms of the contract of insurance. The policy does not provide against

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superfluous if they did not mean to convey the idea of ignition or burning by it. Lord Ellenborough said, in Gordon *v.* Remington, 1 Camp. 123, 'Fire is expressly mentioned in the policy as one of the perils against which the underwriters undertake to indemnify the assured, and if the ship is destroyed by fire, it is of no consequence whether this was occasioned by a common accident or by lightning, or by an act done in duty to the state." 1 Phil. on Ins. 632. And in the Traite des Assurances Terrestres, by De Querault, cited by Judge Willard, I infer it is used in the same sense. I have not had access to the work, but in the citation by the learned judge, the term lightning is evidently spoken of as the cause of fire, and not fire itself. 'La compagnie assure contra l'incendie même contre celui provenant du feu du ciel,' as I translate it, reads, 'The company insures against burning (conflagration) even against that which proceeds from lightning.'

"So also Pothier, in his Traite du Contract d'Assurance, chapter 1, under the head of fire, says, 'Les assurers en sant tenus, lorsque c'est par un cas fortuit comme par le feu du ciel ou dans un combat que le feu a pres au vaisseau.' 'The insurers are liable when the vessel takes fire by accident, as by lightning, or in battle.'"

every damage which may arise from the action of the electric fluid. The charter of the insurance company, indeed, refers to lightning, but it is only to authorize the defendant to insure against losses by *fire* which "shall happen by lightning." This is a very different thing from direct losses by lightning, both as regards their origin, nature, predisposing causes, development, and effects, and in reference to the possible application of means to prevent and to limit the damage. The terms of the policy, too, were to pay within a certain time after the destruction, "by reason or by means of *fire*." Fire is *the one loss* insured against; and lightning, although not excepted from the sources of fire, is nowhere, either in the charter or policy itself, directly provided against. It is true, that there was evidence tending to show, that the building insured on the policy now in question, was set on fire by the lightning; and if such was the fact, this action is well brought. But this fact is not made certain by the evidence, and the question must be submitted to a jury."

§ 115. Fire insurance companies are liable for all losses which are the *immediate consequences* of fire or burning;[1] and therefore, they would be liable in cases where goods are injured by the *fire engines* in putting out a fire, when the building containing the goods was *actually* on fire, or by the *removal of the goods* under the same circumstances, although the goods may not have been burnt, but, in fact, were injured by water, or by breaking, in the act of saving them from fire; and this is on the ground that the fire is the *proximate* cause of the injury; and by a liberal construction of the policy, the goods may be said to have suffered damage by means of fire; and it has been, it is believed, the custom of insurers to pay losses insured against in such cases.[2]

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[1] Babcock, &c. *ub. sup.*, § 113.

[2] Per Grier, J. in Hillier *v.* Alleghany County Mutual Ins. Co. 3 Barr, (Penn.) R. 470.

§ 116. Indeed, an omission of the assured to remove his goods while he had the power, when the building containing them is on fire, or the danger of their destruction is direct and immediate, would be *gross negligence;* so that actual *ignition* is not *always* required. There are certain wares and merchandise of a fusible character, lead pipe, for instance, which may be melted by the heat from the burning of an adjoining building, and therefore a failure on the part of the assured to remove it, when thus exposed to extreme peril, would be inexcusable, if to do so were within his power.[1] In a case before cited, that of Hillier, &c.[2] the court, it is true, do say, that when the peril insured against "is fire, the instrument of destruction must be fire;" but in that case the building from which the goods were removed was not touched by the fire, but the fourth house from it was at one time on fire, and it is stated that the goods were not injured by endeavors to extinguish the fire or save them from it, but in the removal of them under an apprehension that they might be reached by the flames which had caught one of the houses in the same block. The court, moreover, intimate, in that very case,[3] that had the building containing the goods been touched by fire, or the goods injured in their removal while it was on fire, or in efforts to put out the fire, the loss would have been within the policy, which could not be, if the instrument of the destruction must be fire itself. It is clear that an injury to goods by water thown upon them to extinguish a fire, would not be an injury to goods by actual *ignition*, and yet no case can be found where an insurance against damage by fire has been held not to extend to such a case.[4]

§ 117. It should, however, be stated, that although damage

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[1] Case *v.* Hartford Fire Ins. Co. 13 Illinois, R. 676.

[2] See *ante*, § 112.

[3] See *ante*, preceding section.

[4] By the Court, in Case *v.* Hartford Fire Ins. Co. *ub. sup.*

done to goods in the event of their removal, to save them from loss or injury by fire, is within the policy; yet goods in that event may be so carelessly removed, and so wantonly and unnecessarily exposed, as to relieve the insurance company from all liability on account of their injury.[1]

§ 118. In the case of the City Fire Insurance Company *v.* Corlies,[2] the goods insured were destroyed by the *blowing up* of the building, by order of the municipal authorities, to arrest the progress of the great fire in New York, and to save it and others from being burnt up, which otherwise would certainly have been the case. The insurers were held liable for the loss of the goods so occasioned, because *fire* was the proximate cause of the loss. "It matters not," said Bronson, J., "how the flame was kindled — whether it be the result of accident or design — whether the torch be applied by the honest magistrate, or the wicked incendiary — whether the purpose was to save a city, as at New York, or a country, as at Moscow — the loss is equally within the terms of the contract."[3] In the case of the steamboat Lioness,[4] one of the perils insured against was fire, and she was lost by the *explosion of gunpowder* on board; and upon some suggestion made by counsel, whether the loss by the explosion was a loss by fire, or a loss by explosion merely; the court were of opinion, that as the explosion was caused by fire, the latter was the proximate cause of the loss. In Grim *v.* Phœnix Insurance Company,[5] it appeared, that a vessel, with gunpowder on board, was insured, among other risks against fire, and that, during the voyage, she was blown up and wholly lost; and no doubt seems to have been

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[1] See Case *v.* Hartford Fire Ins. Co. *ub. sup.*

[2] City Fire Ins. Co. *v.* Corlies, 21 Wend. (N. Y.) R. 367.

[3] Per Bronson, J. in City Fire Ins. Co. *v.* Corlies, Ibid. And see Pent *v.* Receivers, &c. 3 Edw. (N. Y.) Ch. R. 341, and S. C. 9 Paige, (N. Y.) Ch. R. 568.

[4] Waters *v.* Louisville Ins. Co. 11 Peters, (U. S.) R. 213.

[5] Grim *v.* Phœnix Ins. Co. 13 Johns. (N. Y.) R. 451.

entertained, either by the court or the counsel, that a loss by the explosion of gunpowder, was a loss by fire.

§ 119. The Supreme Court of Louisiana have held, that where sugar and molasses contained in a sugar-house, and covered by an *ordinary* fire policy, are destroyed by an explosion of the *steam boilers* used in the manufacture of sugar, the damage having been produced by the explosion, and not by fire, the insurer will not be held responsible. The court, in this case, were of opinion, that there is a material difference between the risk of explosion of a steam boiler, and that of fire, and that this difference is established by the popular and ordinary meaning attached to each; and, that, if in a policy on articles in a manufactory, worked by steam power, it was intended to cover a loss by explosion, when there was no conflagration, an additional premium would be asked by the insurer. The court also mentioned it to be an obvious fact, that the chances of loss by explosion are not the same as those from fire, the former being dependent on the condition of the machinery, the mode in which it operates, and the care and attention which, in its operation, is bestowed upon it. Steam, said the Court, had been for years the motive power in manufactories in England, and in parts of the United States, and accidents by explosion had often occurred; and it was remarkable that no case had been found in which a recovery had been had on a fire policy, for a loss by explosion; and from this it was fair to infer that the risks had been considered as different.[1] But in a case in which it appeared that insurance was made upon "the hull, tackle, and apparel of the steamboat Moselle," and the risks were those of "the seas, rivers, fires, and *all other losses* or *misfortunes* which shall come to the damage of the said steamboat, according to the true intent and meaning of the policy;" it was held that the loss of the vessel by an explosion of the boiler, was covered by the policy. "A policy

[1] Millaudon *v.* New Orleans Ins. Co. 4 Rob. (Louis.) R. 15.

on ships," said the court, "covers losses arising from accidents to the power which moves them, and, it must be presumed, that the parties contemplated the same protection to a steamboat, when a loss occurs to her motive agencies." [1] The question whether or not it was a loss by fire, was not made.

§ 120. Fire produced by the friction of a wheel on its axle, which consumes the wheel, is a loss of the wheel by fire. The burning of a barrel or other vessel containing quick lime, which is accidentally submitted to the action of water, is a loss by fire as to the vessel, but the spoiling of the lime is not such loss. So the spoiling or consuming of any two chemical fluids by process of combustion, is not a loss by fire as to either of the substances, but as to any third body, it is such loss. Similarly, heat or fire produced by vegetable fermentation, as when a hay-rick takes fire by its own heat, is not a loss by fire as to the vegetable collection, but as to adjoining bodies, it is. The whole hay-rick is considered as under fermenting process, from the difficulty of ascertaining which part was so, and which part was consumed by heat communicated therefrom.[2]

§ 121. Another distinction is, that where fire is actually applied from design, as in the culinary and several manufacturing processes, any loss by misdirection of the process is not considered coming within the object of insurance, inasmuch as the application of heat was not by *accident*, and the consequential damage of over-roasting and the like, is not separable from the original design of applying the flame for the due process. But clothes hanging to dry, meat under process of curing by the slow action of smoke, if destroyed by the flame

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[1] Perrin (Adm'rs) of Protection Ins. Co. 11 Ohio R. 147.

[2] The above exemplifications are given by Beaumont, in his work on Fire and Life Insurance, p. 37, *et seq.*, which he derives from the records of English insurance companies, but he refers to no authorities in the books.

from the fire-place, are "losses by fire." So, if any part of the building adjacent to the fireplace, as the chimney, the timber work round the fireplace, and the like be damaged or destroyed by the fire coming from the grate, these are proper objects for indemnity; but the grate itself, oven, boilers, and other culinary apparatus containing or applied to the fire, for conducting manufacturing process, if destroyed or damaged by the fire which they contain, or to which they are applied, give no claim for indemnity.[1] Where goods on board a steam vessel were spoiled by water escaping from the steam-boiler, this, in a policy of marine insurance, was held not to support a claim.[2]

§ 122. The question whether a loss by fire remotely caused by *negligence* or *carelessness* of the assured or his agents or servants, is one which has undergone many discussions in the courts both of England aud America. It appeared in a case in the Supreme Court of New York,[3] that a vessel was insured, among other risks, against fire; that during the voyage a seaman put up a lighted candle in the binnacle, which took fire and communicated to some powder, and was blown up; and it was held, that the insurers were not liable. But this doctrine may now be considered as overruled. As applied to policies against fire *on land*, the doctrine has for a great length of time prevailed, that losses occasioned by the mere fault of the assured or his servants, *unaffected by fraud or design*, are within the protection of the policies, and as such, recoverable from the underwriters; and in this respect, there is now no distinction between policies against fire on land and at sea.[4]

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[1] Ibid.

[2] Siordet *v.* Hall, 8 Bing. R. 607.

[3] Grim *v.* Phœnix Ins. Co., 13 Johns. (N. Y.) R. 451.

[4] Per Story, J., in Waters *v.* Merchants' Louisville Ins. Co., 11 Peters, (U. S.) R. 213. The assured makes no warranty to the underwriters, that the master and crew shall do their duty during the voyage; and their *negligence* is *no defence* to an action on the policy, where the loss has been immediately

In Rusk *v.* The Royal Exchange Insurance Company,[1] where the immediate cause of the loss of the ship Britannia was fire, produced by the negligence of one of the crew, the underwriters were held liable.[2]

§ 123. In the case of the Patapsco Insurance Company *v.* Coulter,[3] where the loss was by fire, and barratry also was insured against, it was held, by the Supreme Court of the United States, that in such a policy, a loss which was remotely caused by the master or the crew, was a risk taken in the policy. In the case of the Columbian Insurance Company *v.* Lawrence, in the same court,[4] the court thought, that in marine policies, whether containing the risk of barratry or not, a loss whose proximate cause was a peril insured against, was within the protection of the policy; notwithstanding it might have been occasioned by the negligence of the master and mariners. Again, in the case of Waters *v.* Merchants' Louisville Insurance Company,[5] the case of an insurance upon the steamboat Lioness, one of the perils insured against was fire, and the vessel was lost by the explosion of gunpowder, and the loss was held to be within the true intent and meaning of the policy. But if the taking of gunpowder on board was not justified by the usage of trade, and, therefore, was not contemplated as a risk by the policy; there might be great reason, the court thought, to contend, that if it increased the risk, the loss was not covered by the policy.

§ 124. In Ohio, the doctrine that underwriters are liable for

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by the perils insured against. This principle is now entirely established. By Parke, B., in delivering the judgment of the Court, in Dixon *v.* Sadlers, in 5 M. & Welsb. R. 405, and 8 Ibid. 894, by Tindal, C. J.

[1] Rusk *v.* Royal Exchange Ins. Co., 2 B. & Ald. R. 73.

[2] And see likewise Walker *v.* Maitland, 5 B. & Ald. R. 171, and Bishop *v.* Pentland, 7 B. & Cress. R. 219.

[3] Patapsco Ins. Co. *v.* Coulter, 3 Peters, (U. S.) R. 222.

[4] Columbian Ins. Co. *v.* Lawrence, 10 Peters, (U. S.) R. 507.

[5] Waters *v.* Merchants' Louisville Ins. Co. 11 Peters, (U. S.) R. 213.

a loss by fire which proceeded from negligence, does now prevail, though it was formerly otherwise.[1] The courts of that State now follow the doctrine on the subject as above laid down by the English tribunals, and by the Supreme Court of the United States, and especially regard the above case in that court, of Waters *v.* Merchants' Louisville Insurance Company, as an authority of a weighty character. "When," say the Supreme Court of Ohio, "the law of insurance has, in its fuller development, received an important modification, in the English and Federal courts, and which, probably, will be the rule of the State courts, as fast as they act upon the question, it may be emphatically asked, whether the courts of Ohio should not conform to the change? It would be not a little inconvenient, as well as odd, if our citizens should receive one interpretation of the universal law merchant in our courts, while the stranger receives one different. If the proposed change were wrong in itself, it ought not to be adopted; but it seems to commend itself to our acceptance by its intrinsic propriety." It was accordingly held, that in an action on a policy of insurance, it is no defence to show that the loss was occasioned by the negligence of the agents of the assured.[2] In Missouri, in a case where it appeared that a steamboat was insured, among other risks, against fire, and afterwards was put on the floating dock for the purpose of being repaired, and while on the dock was burned, and such burning was occasioned by the carelessness of the boatmen having the boat in charge; the insurers were held liable for the loss. The court, in this case, as did the court in the case in Ohio, above cited, yielded to the authority of the Federal and English courts, and to reason.[3]

§ 125. Therefore, although as a general rule, it is certainly true, that the law will not enable a party to recover compen-

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[1] Lodwic *v.* Kennedy, 5 Ohio R. 433.

[2] Perrin (Adm'rs of) *v.* Protection Ins. Co., 11 Ohio R. 147.

[3] St. Louis Ins. Co. *v.* Glasgow, Shaw & Larkin, 8 Missouri R. 713.

sation for an injury, of which his own negligence and want of due caution, or the misconduct of his agents, have been the primary cause; the contract of insurance forms an exception, inasmuch as one of the principal objects which the assured has in view, in effecting an insurance, is protection against casualties accruing from these causes. One of the arguments used in the case of Shaw *v.* Robberds, in the Court of King's Bench,[1] was, that the loss arose from the plaintiff's own negligent act, in allowing a kiln for drying corn to be used for a purpose to which it was not adapted, and Lord Chief Justice Denman, in delivering the judgment of the court, said, — "There is no doubt, that one of the objects of insurance against fire is to guard against the negligence of servants and others; and, therefore, the simple fact of negligence has never been held to constitute a defence." In reply to the argument, that there was a distinction between the negligence of servants or strangers and that of the *assured himself*, the learned judge said, — "We do not see any ground for such a distinction; and we are of opinion, that in the absence of all fraud, the proximate cause of the loss is only to be looked to."

§ 126. Losses by the *negligence of tenants*, on policies against fire, are within the risks taken; and so losses by the criminal wantonness or misconduct of mere trespassers, or intruders, or felons, are within the common policies against fire. Where underwriters agree to make good any loss by fire originating in any case, except *design in the insured*, the exception admits of all losses not by his design; and, therefore, where the plaintiff negligently left the premises insured derelict, and intruders came and burnt them, without any coöperation or knowledge on the part of the assured, it is a loss within the policy.[2] In the case just cited, the language of the policy was, that the company will make good any loss or

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[1] Shaw *v.* Roberts, *et al.*, Directors of the Norwich Union Fire Ins. Society, 6 Adol. & Ell. R. 75.

[2] Catlin *v.* Springfield Fire Ins. Co. 1 Sumn. (Cir. Co.) R. 434.

damage "by fire, originating in any cause except design in the assured, invasion,"[1] &c.; and, accordingly, it was held, that the company made themselves liable for losses by negligence, as well as by accident; for the exception of losses by design admits all losses not by design. "I do not say," said Mr. Justice Story, "that the defendants would be liable for every loss occasioned by the gross personal negligence of the plaintiff; for it might, under circumstances, amount to a fraudulent loss. But the English authorities clearly are, that, on policies against fire generally, losses by the negligence of tenants are within the risks taken. And it is still more clear, that losses by the negligence of tenants, or by the criminal wantonness or misconduct of mere trespassers, or intruders, or felons, are within the common policies against fire. But in the present policy, there is no room for doubt on this point; the houses excepted are not losses by design generally, but "losses by the design of the assured."

§ 127. The essential circumstance is, that the loss must be *accidental;* but not only *design* in the application of the fire producing loss, excludes claim to indemnity, but if there be *gross neglect,* this would constitute a just ground for a refusal of a claim. If gross neglect be not fraud, it borders upon it (*quasi ex maleficio.*) It has been so ruled in several cases of marine insurance, and necessarily extends itself to fire insurance on land, since the contrary rule would make the contract of fire insurance a conspiracy to endanger the safety of the inmates of a building, and that of the neighboring buildings.[2]

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[1] And see Hollingworth *v.* Brodrick, 7 Ad. & El. R. 40.

[2] Beaum. on Ins. 38; Ripon *v.* Cape, 1 Campb. R. 434. "The law would require the plaintiff to take reasonable care of the property insured. He could not recover if it were proved that the fire was caused by his own fraud or neglect." *Dictum* by Putnam, J., in Fletcher *v.* Commonwealth Ins. Co. 18 Pick. (Mass.) R. 421. Generally speaking, insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against, which would be suggested by his interest. Co-

§ 128. Gross negligence, if not fully equivalent to *fraud*, is inconsistent with *good faith*,[1] unless in the case of an *idiot*, and insurance is not an indemnity for the want of common sense to discern where there is obvious danger of communicating fire by any particular act. To bring a case of insurance within the rule of bailment, every person, according to Lord Ellenborough,[2] who delivers goods to another to be carried for hire, has a right to the *utmost* care, and where a person does not carry for hire, he is bound to take *proper* and *prudent* care of that which is committed to him; and if he ascertains that the article is of great value, he is bound to watch with great care and diligence. In marine insurance, if the negligence be so gross as to authorize the presumption of fraud, which would constitute *barratry*, the underwriters are not liable, unless the policy expressly insures against barratry, or, in other words, fraud.[3]

§ 129. What is *design?* It imports plan, scheme, intention, carried into effect; it must be by incitement, connivance, or coöperation of the assured, directly or indirectly, with the persons who were the agents in the act. It is not sufficient that he is negligent in leaving the premises derelict, and thus exposing them to the wanton or criminal acts of intruders. *Negligence* is not *design.*[4]

§ 130. "By an intent to burn a building," says Chief Jus-

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lumbian Ins. Co. *v.* Lawrence, 2 Peters, (U. S.) 49; Billings *v.* Tolland County Mutual Fire Ins. Co., 20 Conn. R. 130.

[1] Foster *v.* Essex Bank, 17 Mass. R. 479; Neptune Ins. Co. *v.* Robinson, 11 G. & Johns. (Md.) R. 256.

[2] Nelson *v.* Mackintosh, 1 Stark. R. 237; and see Angell on the Law of Carriers, ch. ii.

[3] Per McLean, J., in Waters *v.* Louisville Merchants' Ins. Co., 1 McLean, (Cir. Co.) R. 275.

[4] Per Story, J., in Catlin *v.* Springfield Fire Ins. Co., 1 Sumn. (Cir. Co.) R. 434.

tice Shaw, "we understand a purpose manifested and followed by some act done tending to carry that purpose into effect, but not including a mere non-feasance. Suppose the assured, in his own house, sees the burning coals in the fire-place roll down on to the wooden floor, and does not brush them up, this would be mere *non-feasance.* It would not prove an intent to burn the building; but it would show a culpable recklessness and indifference to the rights of others. Suppose the premises insured should take fire, and the flame begin to kindle in a small spot, which a cup of water would put out, and the assured has the water at hand, but neglects to put it on. This is mere non-feasance; yet no one would doubt, that it is culpable negligence, in violation of the maxim *sic utere tuo ut alienum non laedas.* To what extent negligence must go, in order to amount to gross misconduct, it is difficult, by any definitive or abstract rule of law, independently of circumstances, to designate. The doctrine of the civil law, that *crassa negligentia* was of itself proof of fraud, or equivalent to fraudulent purpose or design, was no doubt founded in the consideration, that although such negligence consists in doing nothing, and is, therefore, a non-feasance, yet the doing of nothing, when the slightest care or attention would prevent a great injury, manifests a willingness differing little in character from a fraudulent and criminal purpose to commit injury."[1]

§ 131. On the other hand, there is no rule of law or usage which would make it the duty of an assured to have his house, if untenanted, guarded by a keeper; and such duty can only be imposed by a *special clause* in the policy.[2] The case of Catlin *v.* The Springfield Insurance Company,[3] was reduced to

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[1] Chandler *v.* Worcester Mutual Fire Ins. Co., 3 Cush. (Mass.) R. 328. See Andrews *v.* Essex Fire & Marine Ins. Co., 3 Mason, (Cir. Co.) R. on p. 26, per Story, J.

[2] Love *v.* Merchants' Ins. Co., reported in Hunt's Merchants' Mag. as having been decided by the Sup. Court of Louisiana, Term, 1851 – 1852.

[3] Catlin *v.* Springfield Ins. Co., 1 Sumn. (Cir. Co.) R. 434.

the consideration of what constitutes a loss by design in the assured, and Mr. Justice Story gave his views as follows: "I say, that it is not a loss by the mere negligence or laches of the party where he has left the property exposed to the peril, but has not coöperated directly or indirectly with those who produced the loss. Design imports plan, scheme, intention, carried into effect. It was not sufficient, said the learned judge, that the assured was negligent in leaving the premises derelict; and that negligence was not design."

§ 132. Where the policy requires the assured, in case of exposure to loss or damage by fire, to use all possible diligence to preserve his goods, and provides, in case of his failure so to do, that the insurers shall not be liable for any loss sustained in consequence of such neglect; if the assured shall remove his goods, the circumstances as they existed at the time the removal was made, must determine the necessity for the removal; and whatever loss or damage is necessarily sustained by the removal of the property insured, when the danger of its destruction by fire was so direct and immediate, that a failure to have made the removal, while he had the power, would have been gross negligence on his part, he is entitled to recover under the policy.[1]

§ 133. Whenever, in an action upon a policy of fire insurance to recover a loss, the defence is, that the assured himself set fire to the premises, the question has arisen, whether the position of the claimant and the position of one indicted for arson, are not identical, as it regards the evidence to establish such criminal act. Such was the question in a case in the English Court of Common Pleas, the defence being, that the plaintiff himself set fire to the premises. The judge had directed the jury that, in order to their finding a verdict against the plaintiff, they ought to be satisfied that the crime imputed to him

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[1] Case *v.* Hartford Fire Ins. Co., 13 Ill. R. 676.

was as fully proved, as would justify them in finding him guilty on a criminal charge; and it was held, that this direction was right.[1] The Supreme Court of Louisiana have been of a different opinion, and they have held, that in such case, the jury should not be instructed to require the same full proof to discharge an insurer, as would be necessary to convict the assured of arson, under the statutes of that State.[2] The truth is, that negligence on the part of the assured, from which a fire has been proved to have been occasioned, may be of so gross, aggravated, and reprehensible a character as to exonerate the underwriter, although evidence of a deliberate intention in the assured to fire the premises, is not such as would be required to convict him of arson, were a criminal proceeding instituted against him for that high offence against the public.[3]

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[1] Thurtell *v.* Beaumont, 1 Bing. R. 339; S. C. 8 Moore, R. 612.

[2] Hoffman *v.* Western Marine & Fire Ins. Co., 1 Rob. (Louis.) R. 216.

[3] As to the evidence of character, it was said in Ruan *v.* Perry, 3 Caines, (N. Y.) R. 120, that, "in actions of tort, and especially charging a defendant with gross depravity and fraud upon circumstances merely, evidence of uniform integrity and good character, is oftentimes the only testimony which a defendant can oppose to suspicious circumstances." The rule in England is this: "that in a direct prosecution for a crime, such evidence is admissible; but when the prosecution is not directly for the crime, but for the penalty, it is not." Attorney-General *v.* Bowman, 2 B. & Pull. R. 532 note (*a*). The *general* evidence in proof of the offence of firing the premises insured and done by the insured, (as in other cases) resolves itself into the probable motives of the accused, his opportunity and means of committing the offence, and his conduct; and the *value of the property*, as compared with the *amount* insured, appears to be a question of great importance, in order to establish or repel the inference of motive. See Ellis on Fire & Life Ins. 68; 2 Starkie on Ev. 69; Rickman's case, East, P. C. 1035. Savage, C. J., in Fowler *v.* Etna Fire Ins. Co., 6 Cowen, (N. Y.) R. 675, says as to evidence of character in cases of this sort, — "If such evidence is proper, then a person may screen himself from the punishment due to fraudulent conduct, till his character becomes bad. Such a rule of evidence would be extremely dangerous. Every man must be answerable for every improper act; and the character of every transaction must be ascertained by its own circumstances, and not by the character of the parties."

§ 134. Mischief arising from the wilful and even felonious acts of servants or strangers, is a risk protected by the policy, and must be borne by the insurers; and this has induced insurance companies to ingraft upon the policy an exception in cases where the fire may happen by any *invasion*, *foreign enemy*, *civil commotion*, or *riot*, or any *military* or *usurped power*.[1] An exception of this nature seems first to have been introduced into the conditions of the London Assurance Company in 1720, which was confined to "damage happening by any invasion, foreign enemy, or any military or usurped power," and upon the meaning of that exception the following case arose: In 1766 a mob assembled at Norwich, in consequence of the high price of provisions, and destroyed several quantities of flour; but, upon proclamation being read, the people dispersed. Shortly afterwards a mob collected again, and they burned down a malting-house which was insured in that office. The insurers defended the action, on the ground that the property had been destroyed by an usurped power, and the question was discussed in the Court of Common Pleas. Three of the judges were of opinion that these words could not be construed to include a *common mob*, but that they were to be taken in conjunction with the other part of the sentence, and meant a burning or setting on fire "by occasion of any invasion from abroad, or an internal rebellion when armies are employed to support it," when the laws are dormant and silent, and the firing of towns is unavoidable."[2]

§ 135. In 1726 the Sun Fire Office adopted the same clause, and in 1727, added the words "civil commotion" to it; and upon them a discussion arose in consequence of the riots in London, in June, 1780. Among the outrages committed during their continuance, the mob burnt down the house of a Roman Catholic, by the name of Langdale, which was insured

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[1] Dowd. on Fire & Life Ins. 102.

[2] Drinkwater *v.* London Assur. Co., 2 Wils. R. 363.

at the Sun Fire Office, and he brought an action against the company to recover this loss. Upon the trial, Lord Mansfield expressed his opinion as to the effect of these words, in the following terms, — "I think a 'civil commotion' is this: an insurrection of the people for general purposes, though it may not amount to a rebellion, where there is a usurped power. If you think, that this was an insurrection of the people for the purposes of mischief, though not amounting to a rebellion, you will find for the defendants;" and the jury found a verdict accordingly.

§ 136. Other English fire companies have added to the above words, the word *riot*, which has been defined to be a tumultuous disturbance of the peace by three persons or more assembling together of their own authority, with an intent mutually to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner to the terror of the people, whether the act intended were of itself lawful or unlawful."[1] The difference between a rebellious mob, and a common mob is, that the first is high treason, the latter a riot; the mob wants a universality of purpose to make it a rebellious mob or treason.[2] The use of the term "riot" would restrict the operation of the policy within narrower limits than the phrase "civil commotion," which, in its *ordinary acceptation*, imports a disturbance of a far more general character than such as may be committed by *three* persons.

§ 137. In Dupin *v.* Mutual Insurance Company, in Louisiana,[3] which was an action on a policy of fire insurance, the defence was, that the building insured was set fire to and

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[1] Langdale *v.* Mason, Park on Ins. 965, 8th Eng. ed.

[2] Hawk. Pleas of the Crown, cap. 65.

[3] Dupin *v.* Mutual Ins. Co., 5 Rob. (Louis.) R. 482.

destroyed by *rioters*, and that the case came within the following clause in the policy: "Provided always, and it is hereby declared, that this corporation shall not be liable to make good any loss by fire which may happen or take place by means of any invasion, insurrection, *riot*, or civil commotion, or of any military or usurped power, or by an earthquake or hurricane." It was held that under this clause, where a house is destroyed by a riotous assemblage, the insurer is not liable for the loss; and that it was immaterial whether the rioters assembled originally for a riotous purpose, but afterwards were guilty of a riot. It was contended that the fact that there was a riot should be established by the judgment of a competent court in criminal proceedings, wherein the rioters were tried and convicted; but the court said, there had not been cited, nor were they aware of, any authority in support of that position.[1]

§ 138. A question arose,[2] respecting the exception of "usurped power" out of the great fire which occurred in the city of New York, on the morning of the 17th of December, 1835, upon which calamitous occasion, a store, No. 75, Pearl Street, was, by order of the mayor of the city, blown up with gunpowder, and the goods therein entirely destroyed. An attempt was made to make it appear, that although the mayor had no authority, yet as he acted *colore officii*, it was a case happening by means of *usurped power*, which, in the policy, was expressly excepted. Now it is very evident, that there is an impossibility in maintaining, that a mere *excess of jurisdiction*, by a lawful magistrate, is the exercise of an "usurped power," within the meaning of that exception; and so the court viewed it. "That is not," says Bronson, J., in behalf of the court, "*what the insurers had in mind* when they made the exception." "Whether the mayor," said the

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[1] Dupin *v.* Mutual Ins. Co., 5 Rob. (Louis.) R. 482.

[2] City Fire Ins. Co. *v.* Corlies, 21 Wend. (N. Y.) R. 367.

learned judge, "had the concurrence of two aldermen as the statute provides, or not, there can be no doubt of his common-law power, as the chief magistrate of the city, to destroy buildings, in a case of necessity, to prevent the spreading of a fire. Indeed, the same thing may be done by any magistrate, or even by a citizen without official authority." [1]

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[1] Mayor of New York *v.* Lord, 17 Wend. (N. Y.) R. 285.

CHAPTER VI.

OF WARRANTY AND REPRESENTATION.

§ 139. UNDER the above head it is proposed to pursue the subject more minutely, of the extent and nature of the insurer's risk. The obligatory effect of his or their policy, or its availability, as a contract of *indemnity* to the assured,[1] essentially depends upon an observance, or upon a want of an observance, by the assured, of the express stipulations inserted in the policy; and furthermore, upon the disclosure, or the want of disclosure of facts by the assured, whether oral or written, which have induced the underwriter to assume the risk. Hence have originated the titles in *insurance law* of WARRANTY, REPRESENTATION, and CONCEALMENT. These and the WANT OF INTEREST, before treated of,[2] are the important grounds that are relied on by an underwriter or an insurer, in resisting an action upon a policy brought by the assured. It is proposed in the present chapter to consider the subjects of *warranty* and *representation* in connection, and to illustrate the contradistinction between them; reserving the subject of *concealment* for the next following chapter.

§ 140. An *express warranty* then, *in the law of insurance*, is a stipulation inserted in writing on the face of the policy, on the *literal* truth or *fulfilment* of which the validity of the entire contract depends.[3] The stipulation is considered to be

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1 See *ante*, Introd. § 1, *et seq.*

2 See *ante*, Chap. IV.

3 1 Arn. on Mar. Ins. 577; Delonguemare *v.* Tradesman Ins. Co. 2 Hall,

on the face of the policy, although it may be written in the margin or transversely, or on a subjoined paper, referred to in the policy.[1] No particular form of words is necessary to constitute an express warranty; the word "warranty," or "warranted," for instance, is in no case necessary.[2] Thus, in marine insurance, the words "*to sail* on such a day," or "*in port*," or "*all well*," on such a day, or "*carrying so many guns and so many men, &c.*" would amount to an express warranty requiring a literal fulfilment, as much as though there was a more formal clause to the same effect.[3]

§ 141. Although it is, as a general rule true, that a paper *not attached to a policy* does not form a part of it, yet it may be that a paper not so attached, will be made a part of it, and amount to a *warranty*, by the express terms of it.[4] "No one," says Bronson, J., "could well deny, that the policy may so speak of another writing as to make it a part of the contract, although not actually embodied in the policy."[5] Where, for instance, after a brief description of the property insured, there is a clause stating that reference may be had to the application of the assured *as forming a part* of the policy, the application is thus, by *express words*, made part and parcel of the contract, and the written application and the policy become so

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(N. Y.) R. 589; Beaum. on Fire & Life Ins. 54; Duncan *v.* Sun Fire Ins. Co. 6 Wend. (N. Y.) R. 488; New York Gas Light Co. *v.* Mechanics Fire Ins. Co. 2 Hall, (N. Y.) R. 100; 1 Marsh. on Ins. 354.

[1] 3 Kent, Comm, 7th ed. 450; Fowler *v.* Etna Fire Ins. Co. 6 Cow. (N. Y.) R. 673; S. C. 7 Wend. (N. Y.) R. 270. See *ante*, Introd. § 14, 15; Hogan *v.* Delaware Ins. Co. 1 Wash. (Cir. Co.) R. 419; Murdock *v.* Chenango Mutual Ins. Co. 2 Comst. (N. Y.) R. 210.

[2] Arn. on Ins. 579.

[3] Ibid., and Kenyon *v.* Berthon, 2 Doug. R. 12.

[4] See *ante*, § 14, and on pp. 10, 49; Snyder *v.* Farmers Ins. & Loan Co. 16 Wend. (N. Y.) R. 92.

[5] Burritt *v.* Saratoga County Mutual Ins. Co. 5 Hill, (N. Y.) R. 188; the learned Judge referring to the case of Routledge *v.* Burrell, 1 H. Black. R. 254.

moulded into one that they amount to a warranty.[1] In the case of French *v.* Chenango County Mutual Insurance Company,[2] the property insured was mentioned in the policy, "reference being had to the application of said T. & T. French, for a *more particular description*, and the *conditions annexed*, as forming a part of this policy." The conditions, the court were of opinion, undoubtedly made a part of the contract of insurance, as much as if they had been embodied in the policy; but it was otherwise with the application. The latter, as it seemed to the court, was referred to for the *mere* purpose of describing and identifying the property insured, and not to incorporate its statements into the policy as parts thereof. But the material question in the case would not have been changed if the application could have been regarded as a part of the policy.

§ 142. A warranty in a policy of insurance, in whatever form created, as before stated, is a condition or a contingency,

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[1] See *ante*, § 14, and on p. 49.

[2] French *v.* Chenango County Mutual Ins. Co. 7 Hill, (N. Y.) R. 122. It was observed by Jones, C. J., in Delonguemare *v.* Tradesman Ins. Co. 2 Hall, (N. Y.) R. 589, that "in all the cases, where a warranty has been held to arise from the description of the subject, or the expressions of the parties, that description, or those expressions, have appeared on the face of the policy. No authority has been shown for extending the rule to descriptions or expressions contained in other documents, to which the policy may refer; and such an extension of the rule would, I think, be unwarrantable, unless the reference to the collateral writing be such as clearly to make it a part of the contract. It was on this latter ground, that in policies against loss by fire, the obligation imposed on the assured by the printed proposals annexed to the policy, to procure the certificate of the minister, or churchwardens and parishioners, of the reality of the loss, and the fairness of the claim, has been held to be a condition precedent to the right of the assured to recover which cannot be dispensed with, though the certificate be wrongfully withheld; for the policy, in such cases, not only refers to the writing which is attached to it, but the express undertaking of the insurer is to pay the loss according to the exact terms of the printed proposals. They are consequently made a part of the policy."

and unless that be performed there is no contract. It is styled a CONDITION PRECEDENT, which means, that it is perfectly immaterial for what purpose the warranty is introduced, and that no contract exists unless the warranty be literally complied with. The only conceivable cases in which a compliance with an express warranty might be excused, would be (in the words of a very learned and able writer,) "if the state of things contemplated by the warranty were to cease; or if a *subsequent* law should pass rendering a compliance with a previous law illegal." [1]

§ 143. It would, therefore, seem that a warranty in a policy of insurance, differs from a *common* warranty. The effect of a warranty of soundness, or against defects in the *sale of goods*, does not extend to defects which are obvious to the senses; but however much persons may differ as to there being a satisfactory reason for making a distinction between a warranty in a policy of insurance, and one upon a sale of property, the adjudged cases, in England and in America, fully sustain the principle, that where a policy is clear and explicit, no parol evidence *aliunde*, can be admitted to contradict, control, or restrain or extend it.[2] Yet it was observed by Nel-

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[1] 1 Arnold on Ins. 584.

[2] "A warranty being in the nature of a *condition precedent*," says Ellis, (on the Law of Fire and Life Insurance, p. 28,) "it is quite immaterial for what purpose, or with what view it is made; but being once inserted in the policy, it becomes a binding security on the assured; and unless he can show that it has been strictly fulfilled, he can derive no benefit from the policy." For since it is competent for parties to make their contracts dependent upon any conditions, which even *caprice* may suggest, whether the portion of a warranty be eventually discovered to be incorrect, or not complied with, be material or wholly immaterial, with respect to the nature of the risk, the result will be the same; and *ante*, p. 171. Thus expressly laid down by Dowd. on Life and Fire Ins. 35, and see also, O'Niel *v.* Buffalo Ins. Co. 3 Comst. (N. Y.) R. 122. See authorities cited, *ante*, § 14, and 20, 21 *et seq.*; Beaum. on Fire and Life Ins. ch. vii.; Rodgson *v.* Richardson, 1 Bl. R. 463; Carter *v.* Boehm, 3 Burr. R. 1909, 1 Bl. R. 593; 3 Kent Comm. 7th

son, C. J., in relation to the clauses in the contract of insurance, that "there is no more reason for claiming a strict literal compliance with its terms than in ordinary contracts. Full legal effect should always be given to it, for the purpose of guarding the company against fraud or imposition; beyond this we would be sacrificing *substance* to *form* —following words rather than ideas." [1]

§ 144. An *implied* warranty is something contracted for which necessarily *results* from the terms of the contract. In marine insurance, there is an implied warranty in the policy, that the vessel insured shall be *seaworthy*, and a strict compliance with this warranty is invariably enforced, on the ground, that the effect of insurance might be to render those persons, who were protected from loss by the policy, careless about the condition of the ship, and the consequent safety of

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ed. 450; De Hahn *v.* Hartley, 1 T. R. 343; Whitney *v.* Haven, 13 Mass. R. 172; Flinn *v.* Tobin, 1 Mood. & Malk. R. 367; Dow *v.* Whetton, 8 Wend. (N. Y.) R. 166; Snyder *v.* Farmers' Ins. and Loan Co. 13 Wend. (N. Y.) R. 92, and 16 ibid., *in error*, 481; Stebbins *v.* Globe Ins. Co. 2 Hall, (N. Y.) R. 631; Langden *v.* New York Equitable Ins. Co. 1 Hall, (N. Y.) R. 226; Duncan *v.* Sun Fire Ins. Co. 6 Wend. (N. Y.) R. 488; New York Gas Light Co. *v.* Mechanics Fire Ins. Co. 2 Hall, (N. Y.) R. 100; Fowler *v.* Etna Fire Ins. Co. 17 Wend. (N. Y.) R. 270; Alston *v.* Mechanics Mutual Ins. Co. 4 Hill, (N. Y.) R. 329; Sexton *v.* Montgomery County Mutual Ins. Co. 9 Barb. (N. Y.) Sup. Co. R. 191; Burritt *v.* Saratoga County Mutual Ins. Co. 5 Hill, (N. Y.) R. 188; Curry *v.* Commonwealth Ins. Co. 10 Pick. Mass. R. 535; New York Bowery Ins. Co. *v.* New York Fire Ins. Co. 17 Wend. (N. Y.) R. 359; Fitzherbert *v.* Mather, 1 T. R. 12; Stetson *v.* Massachusetts Mutual Fire Ins. Co. 4 Mass. R. 337; Kennedy *v.* St. Lawrence County Mutual Ins. Co. 10 Barb. (N. Y.) Sup. Co. R. 285; Holmes *v.* Charlestown Mutual Fire Ins. Co. 10 Met. (Mass.) R. 211; Gates *v.* Madison County Mutual Ins. Co. 2 Comst. (N. Y.) R. 43; Pettigrew *v.* Pringle, 3 B. & Adol. R. 314; Graham *v.* Barras, 5 B. & Adol. R. 1011; Bell *v.* Western Marine and Fire Ins. Co. 5 Rob. (Louis.) R. 423.

[1] Turley *v.* North American Fire Ins. Co. 25 Wend. (N. Y.) R. 374.

the crew.[1] It is also well known, that it is an implied condition precedent, in a policy of marine insurance, that the assured shall not be negligent in providing a crew of competent skill, and one adequate to discharge the usual duties.[2] Negligence, in these cases is *gross* negligence, partaking, as in fire insurance, of the nature of, if not amounting to, actual fraud.[3] But a warranty will in no case be extended by construction to include any thing not *necessarily* implied in its terms. Thus, in the case of Hyde *v.* Bruce,[4] where there was a warranty that "the ship should have twenty guns," and it appeared that, although, in fact, the ship did have twenty guns, yet she had only twenty-five men, *a number short of the necessary complement* for twenty guns; Lord Mansfield held, that this warranty did not imply that she should carry a competent number of men to work the guns, and, therefore, as there was no ground to impute fraud,[5] that the warranty had been sufficiently complied with.

§ 145. A warranty may apply either to matters *subsequent* or to matters *precedent*.[6] It was observed by Tindal, C. J., in Borradaille *v.* Hunter,[7] that two classes of conditions are usually inserted in policies of insurance; the first pointing to the time of the contract; the second to things which may occur at a time subsequent. Writers on insurance, in the former case, term the stipulation an *affirmative*, and in the

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[1] 1 Arn. on Ins. 652; Dixon *v.* Sadler, 5 M. & Welsb. R. 414; Craig *v.* United States Ins. Co. Peters, (Cir. Co.) R. 410; 1 Marsh. on Ins. 354.

[2] 1 Arn. on Ins. 683; Hunter *v.* Potts, Selw. N. P. 1031, (9th ed.); American Ins. Co. *v.* Ogden, 15 Wend. (N. Y.) 532. The doctrine of marine insurance has been held to apply to steamboats on inland navigable waters. Waters *v.* Merchants Louisville Ins. Co. 11 Peters, (U. S.) R. 213.

[3] See *ante*, § 122, *et seq.*

[4] Hyde *v.* Bruce, 3 Doug. R. 213; 1 Marsh. on Ins. 354, and 1 Arn. on Ins. 585.

[5] See *ante*, § 128, *et seq.*

[6] Duncan *v.* Sun Fire Ins. Co. 6 Wend. (N. Y.) R. 488.

[7] Borradaille *v.* Hunter, 5 M. & Grang. R. 639.

latter a *promissory* warranty,[1] and a breach of warranty consists either in the falsehood of an affirmative or in the non-performance of an executory stipulation.[2] In marine insurance, the stipulation is affirmative where the assured undertakes for the positive allegation, that the thing insured is neutral property, or that she is of such a force, or that she was well on such a day, &c.[3] In the case of fire policies, the warranty has most usually been, in England, of an affirmative nature.[4] In a case in this country it appeared, that in an application for insurance referred to in the policy as forming part thereof, it was stated thus, "there is one stove [in the building insured]; pipe passes through the window at the side of the building. There *will* however, be a stove chimney built, and the pipe *will* pass into it at the side." This seems to have been deemed an executory contract amounting to a warranty, that the chimney *should* be built within a reasonable time, and a violation of the engagement, it was considered, would avoid the policy.[5] But the distinction between *affirmative* and *promissory* warranties, it has been considered,

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[1] 1 Marsh. on Ins. 353; 1 Arn. on Ins. 578; Jefferson Ins. Co. *v.* Cotheal, 7 Wend. (N. Y.) R. 72.

[2] De Hahn *v.* Hartley, 1 T. R. 343.

[3] 1 Marsh. on Ins. 353, 354; 1 Arn. on Ins. 578; and see Whitney *v.* Haven, 13 Mass. R. 172; Bryant *v.* Ocean Ins. Co. 22 Pick. (Mass.) R. 200.

[4] Ellis on Fire and Life Ins. 28; O'Niel *v.* Buffalo Fire Ins. Co. 3 Comst. (N. Y.) R. 122.

[5] Murdock *v.* Chenango Mutual Ins. Co. 2 Comst. (N. Y.) R. 210. And see as to a promissory warranty Houghton *v.* Manufacturers Ins. Co. 8 Met. (Mass.) R. 114. "If any person insuring any property in this company, shall make *any* misrepresentation in the application, or if *after the insurance is effected*, the risk of the property *shall be* increased, by any means whatever, within the control of the assured, or if the building or premises *shall be* occupied in any way so as to render the risk *more hazardous* than *at the time of insuring*, and not specified in the said application, such insurance shall be void;" is an executory or promissory contract, Jennings *v.* Chenango County Mutual Ins. Co. 2 Denio, (N. Y.) R. 78.

is one rather of form than substance, many warranties that are in form *affirmative* being, in *fact*, also *promissory*.[1]

§ 146. As has already been stated, the leading principle of *mutual* insurance companies is, that every person whose property is insured becomes a member, and is consequently under obligation to observe its by-laws;[2] and the rules and regulations being referred to in the policy, are to be taken as a *part of the contract* of warranty, in the same manner as if they had been introduced into the body of the policy.[3] The Boston Mutual Fire Insurance Company executed a policy insuring a three-story brick building called the "Central Exchange,"

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[1] 1 Arn. on Ins. 578; and see Houghton *v.* Manufacturers Ins. Co. 8 Met. (Mass.) R. 114.

[2] See *ante*, § 10, and p. 45; and see Shirley *v.* Mutual Assurance Society, 2 Rob. (Va.) R. 705.

[3] Holmes *v.* Charlestown Mutual Fire Ins. Co. 10 Met. (Mass.) R. 211; Susquehanna Ins. Co. *v.* Perrine, 7 Watts & S. (Penn.) R. 348. As to *mutual* companies see Post *v.* Hampshire Mutual Fire Ins. Co. 12 Met. (Mass.) R. 555; Liscom *v.* Boston Mutual Fire Ins. Co. 9 Met. (Mass.) R. 205; Borden *v.* Hingham Mutual Fire Ins. Co. 18 Pick. (Mass.) R. 523; Deraismes *v.* Merchants Mutual Fire Ins. Co. 1 Comst. (N. Y.) R. 371; McMasters *v.* Bruce, 25 Wend. (N. Y.) R. 379; Shirley *v.* Mutual Assurance Society, 2 Rob. (Va.) R. 505; Mutual Assurance Society *v.* Stone, 3 Leigh, (Va.) R. 218; 2 Dessau, (S. C.) R. 148; Coston *v.* Alleghany Mutual Ins. Co. 1 Barr, (Penn.) R. 322; Clarke *v.* New England Mutual Fire Ins. Co. 6 Cush. (Mass.) R. 342; Smith *v.* Bowditch, 6 Cush. (Mass.) R. 448; Indiana Mutual Fire Ins. Co. *v.* Coquillard, 2 Cart. (Ind.) R. 645; Hillier *v.* Alleghany Mutual Ins. Co. 4 Barr, (Penn.) R. 472; Sun Mutual Ins Co. *v.* Mayor &c. of New York, 8 Barb. (N. Y.) Sup. Co. R. 450; Andrews *v.* Ellison, 6 Moore R. 199; Hare *v.* Folgers, 1 Sand. (N. Y.) Sup. Co. R. 177; Same *v.* Receivers, &c., 1 Sand. (N. Y.) Sup. Co. R. 181; Brouver *v.* Appleby, 1 Sand. (N. Y.) Sup. Co. R. 158; Merchants Mutual Ins. Co. *v.* Leeds, 1 Sand. (N. Y.) Sup. Co. R. 183; Aspinwall *v.* Meyer, 2 Sand. (N. Y.) Sup. Co. R. 180; Alston *v.* Mechanics Mutual Ins. Co. 4 Hill, (N. Y.) R. 329; Jennings *v.* Chenango County Mutual Ins. Co. 2 Denio, (N. Y.) R. 78.

which was afterwards burned: it appeared, that a by-law of the company was attached to the policy, when it issued, and was in these words, — "All policies which may issue from this company, to cover property previously insured, shall be void, unless such previous insurance be expressed in the policy at the time it issues." On the policy when it issued was this memorandum: "Five thousand dollars insured by the Worcester Mutual Fire Insurance Company." The prior insurance was in fact, four thousand and seven hundred dollars on the three-story brick building and a two-story wooden building, connected therewith, which were called the "Central Exchange," and three hundred dollars on a barn near the same. In a suit on the second policy, it was held, that though a compliance with the said by-law was a condition precedent to the validity of the policy, yet that the said memorandum of the prior insurance was a sufficient compliance with the by-law, and that the defendants were liable on their policy.[1] But a mutual company has no right, without the consent of a corporator, to impose any *new* condition, affecting the contract to his injury; as by a by-law passed *after* the making of the contract.[2]

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[1] Liscom *v.* Boston Mutual Fire Ins. Co. 9 Met. (Mass.) R. 205. Burnside, J., in delivering the opinion of the Court, in Satterthwaite *v.* Mutual Beneficial Ins. Association, 2 Harris, (Penn.) R. 393, says, in reference to the principle of the organization of mutual insurance companies, — "They were originally intended for the safety of the vicinity and country in which they were located. In some instances, they have attempted to grasp the state, and to extend their operations into every county. For one, I will never agree to extend to them the law as it has been settled in cases of *marine* insurance. They shall have the law fairly administered according to their *charters*." In this case it appeared that there was nothing in the constitution, or in the by-laws of the company which imposed any duty upon the assured but to make his application. The court held, that, "when the company is satisfied, the policy issues, and the assured pays his money, and gives his bond, which becomes a part of the capital of the company."

[2] Ins Co. *v.* Connor, 5 Harris, (Penn.) R. 136.

§ 147. A *representation*, in the technical sense in which the word bears to the law of insurance, and as distinguished from *warranty*, has been well defined as follows: "A verbal or written statement made by the assured to the underwriter, *before the subscription of the policy* as to the existence of some fact or state of facts, tending to induce the underwriter more readily to assume the risk, by diminishing the estimate he would otherwise have formed of it." [1] The term, in insurance, it has been considered, as in the nature of a *collateral* contract, either by *writing not inserted* in the policy, or by *parol*, and is a communication of facts and circumstances relative to the insurance made to the underwriters, with the view to enable them to estimate the risk and calculate the premium to be paid.[2] There is no difficulty in distinguishing a *representation* from a *warranty;* the former being a part of the *preliminary proceedings* which *propose* a contract, and the latter a part of the contract as it has been completed; a misrepresentation renders the contract void on the ground of *fraud*, a non-compliance with a warranty is an *express breach of the contract.*[3] A want of truth in a representation is fatal

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[1] 1 Arn. on Ins. 489.

[2] Ellis on Fire and Life Ins. 29. Vice-Chancellor M'Coun has stated the difference between a warranty and a representation to be thus: "The former is the affirmation of a fact asserted in the policy, and forming a condition which must be strictly complied with; the latter the statement of some *collateral* circumstances not embodied in the policy, though made before the contract was completed." Callaghan *v.* Atlantic Ins. Co., 1st ed., (N. Y.) Ch. R. 74; see also Snyder *v.* Farmers Loan Ins. Co., 13 Wend. (N. Y.) R. 92; Hazard's Adm'rs *v.* New England Ins. Co., 8 Peters, (U. S.) R. 557.

[3] Williams *v.* New England Fire Ins. Co., 31 Me. R. 219, (by Reddington); Farmers Ins. and Loan Co. *v.* Snyder, 16 Wend., (N. Y.) R. 481; French *v.* Chenango Ins. Co., 7 Hill, (N. Y.) R. 122; Kennedy *v.* St. Lawrence County Mutual Ins. Co., 10 Barb. (N. Y.) Sup. Co. R. 285; 5 Rob. (Louis.) R. 423; O'Neil *v.* Buffalo Ins. Co. 3 Comst. (N. Y.) R. 122; Kentucky and Louisville Ins. Co. *v.* Southard, 8 B. Mon. (Ken.) R. 634; Gates *v.* Madison County Mutual Ins. Co. 2 Comst. (N. Y.) R. 43;

or not to the insurance as it happens to be material or immaterial to the risk undertaken; but when a thing is warranted to be of a particular nature or description, it must be *exactly* such as it is represented to be; otherwise the policy is void and there is no contract; and this may be considered as a first principle of the law of insurance. This was the doctrine laid down by Lord Eldon in the British House of Lords in an appeal from the court of session of Scotland. The question arose on a policy of fire insurance of a cotton-mill in the county of Lanark. The insurance was made with the Newcastle Fire Insurance Company, and the mill was burnt; and in an action against the insurers the question was, whether this mill, which was warranted as in the first class of risks, was not truly of the second class? It turned out to be of the second class, and it was held, that an action on such a policy could not be sustained, Lord Eldon observing, that whether the misrepresentation was in a material point or not, or whether the risk was equally great in the one class as in the other, were questions which had nothing to do with the case; the only question being, — "Is this, *de facto*, the building which I have insured?"[1] The decision of Lord Eldon in this case was acknowledged as authority by the Supreme Court of the state of New York, in Duncan *v.* Sun Fire Insurance Company;[2] also by the Superior Court of the city of New York, in Delonguemare *v.* Tradesmens Insurance

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Pratt *v.* Philbrook, 3 Red. (Me.) R. 461. "He who contracts," says Arnold, and he but repeats what is the principle recognized by all the writers on insurance, "with another party, owing to a suppression, or misstatement by that other, of any fact, which, if disclosed, would have prevented him from entering into the contract at all, or at least on the same terms, would appear in all cases to have a full right, if such fact lay peculiarly within the knowledge, or the means of knowledge of the other party, and not within his own, to repudiate the contract on such suppression, or misrepresentation of the truth." 1 Arn. on Ins. 487; and see 3 Kent Comm. 373.

[1] M'Morran *v.* Newcastle Fire Ins. Co. 3 Dow. R. 255.

[2] Duncan *v.* Sun Fire Ins. Co. 6 Wend. (N. Y.) R. 488.

Company.[1] The main distinction between a representation and a warranty, *in form*, is that the former may be made orally or in writing; but in neither case is introduced into the policy; whereas the latter must always be in writing and appear on the face of the policy.[2] Representations are *dehors* the policy.[3]

§ 148. Parties by their express contract may place a representation, in relation to particular facts, upon the same footing as a warranty, as in the case of Burritt *v.* Saratoga County Mutual Fire Insurance Company.[4] So too, although it is laid down as a general rule that all positive statements relating to the risk or the subjects of insurance will, if inserted in the policy, be construed as express warranties, and not as representations, yet it is considered, that there can be but little doubt that if a positive statement of material facts were inserted in the policy with an *express stipulation* that it should be construed *not* as a warranty, but as a representation, such express stipulation would prevail over the general rule.[5]

§ 149. A *representation*, as has been stated, of a warranty,[6] may be either *affirmative* or *promissory*. But in Alston *v.* Mechanics Mutual Insurance Company,[7] Walworth, Chancellor, says, — "Marshall, who, I admit, is a writer of very

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[1] Delonguemare *v.* Tradesmens Ins. Co. 2 Hall, (N. Y.) R. 589; see also Lindenau *v.* Desborough, 8 B. & Cress. R. 586.

[2] 1 Arn. on Ins. 499; and see *ante*, § 19, p. 54, *et seq.*; and § 141, *et seq.*

[3] Nicoll *v.* American Ins. Co. 3 Wood. & Min. (Cir. Co.) R. 529.

[4] Burritt *v.* Saratoga County Mutual Ins. Co. (N. Y.) R. 188. In this case among the conditions annexed to the policy was, — "If any person insuring any property, shall make *any* misrepresentation or concealment in the application, such insurance shall be void and of no effect." And see Egan *v.* Mutual Ins. Co. of Albany, 5 Denio, (N. Y.) R. 326; O'Niel *v.* Buffalo Ins. Co. 3 Comst. (N. Y.) R. 122.

[5] Arn. on Ins. 492, and Duer on Representations, 45.

[6] See *ante*, § 145.

[7] Alston *v.* Mechanics Mutual Ins. Co. 4 Hill, (N. Y.) R. 334.

considerable authority on the law of insurance, does indeed speak of two different kinds of representation, one of which he calls an *affirmative* and the other a *promissory* representation. But I have not been able to find any case in which a court has adopted this distinction. And the only other writer on the law of insurance who appears to have considered a representation as a contract between the parties, is Ellis. He says, a representation in insurance, is in the nature of a *collateral contract.* I have examined Westkett, Annesley, Hughes, Park, Beaumont, Phillips, Emerigon, Blaney, Quenault, Lafond, Perail, Merlin, Pardessus, Boulay Paty, and the works of some other English and foreign writers on the subject of marine, fire, and life insurance; and so far as they say any thing on the subject, I find them concur in saying, that misrepresentation, in reference to insurance contracts, is a false affirmation as to some fact material to the risk; which affirmation is made by the assured, or his agent, either from a mistake as to the fact represented, or with a design to deceive the insurer."

§ 150. There is, in the general law of insurances, a distinction to be drawn between *promissory positive representations*, and representations of *expectation or belief;* the former being positive engagements that certain material facts shall, or will exist; and the latter being merely expressions of expectation, or belief that they *will* or *do* exist. It is easily comprehended that unless, in the former case, facts take place substantially corresponding with those specified, the underwriter shall not be liable on the policy; the latter imply no stipulation of the sort, and a non-performance accordingly can only avoid the policy in cases of actual fraud.[1] "Upon the point of misrepresentation," (says Mr. Justice Story, in a case of marine insurance,) "there is a consideration which requires attention. Where a letter contains a representation of facts not known to the party, but from the *information of others*, and so the letter

[1] 1 Arnould on Law of Marine Ins. 507.

states the facts, or it is a necessary inference from the nature of them, there the representation is not falsified by the mere proof that the facts are not so, if the party communicating the facts did receive such information, and *bonâ fide* confided in it. He undertakes there, not for the truth of the *facts*, but for the truth of his information." [1]

§ 151. In regard to the technical term of "representation," which we are now considering, a distinction is taken between *marine* and *fire* policies.[2] This distinction is thus pointed out by Bronson, J., in giving the judgment of the court, in Burritt *v.* Saratoga County Mutual Fire Insurance Company,[3] — "In marine insurance the misrepresentation or concealment by the assured of a fact material to the risk, will avoid the policy although no fraud was intended. It is no answer for the assured to say, that the error or suppression

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[1] Tidmarsh *v.* Fire and Marine Ins. Co. 4 Mason, (Cir. Co.) 439. "A moment's consideration," says Arnould, *ub. sup.*, "will show that this distinction is well founded; if a man assures me positively that certain events over which he has a control, and without which I should decline entering into the contract on the faith of that positive assurance, it seems clear that such statement must substantially be made good, in order to make me liable on such contract. If, however, he merely tells me that he *believes* or *expects* that such events will happen, in a certain way, and I choose to enter into the contract upon the mere chance of such belief or expectation turning out well-founded, I have no right to be released from my contract on its proving fallacious; for its failure was a contingency which I ought to have contemplated on entering into my contract. If indeed, I can show, that *with a design to deceive me*, he represented himself as *expecting or believing*, that which *he knew at the time to be impossible or untrue*, I shall be released from my contract on the ground of this his actual fraud."

[2] O'Niel *v.* Buffalo Ins. Co. 3 Comst. (N. Y.) R. 122; Mackie *v.* Pleasants, 2 Binn. (Penn.) R. 363; Taylor *v.* Lowell, 3 Mass. R. 330; Strong *v.* Manufacturers Ins. Co. 10 Pick. (Mass.) R. 40; Masters *v.* Madison County Mutual Ins. Co. 11 Barb. (N. Y.) Sup. Co. R. 624; De Forest *v.* Fulton Fire Ins. Co. 1 Hall, (N. Y.) R. 84, cited *ante* § 75, 117.

[3] Burritt *v.* Saratoga County Mutual Fire Ins. Co. 5 Hill, (N. Y.) R. 588.

was the result of mistake, accident, negligence, forgetfulness, or inadvertence. It is enough, that the insurer has been misled, and has thus been induced to enter into a contract, which, upon correct and full information, he would either have declined, or would have made upon different terms. Although no fraud was intended by the assured, it is nevertheless a fraud upon the underwriter, and avoids the policy.[1] The assured is bound, although no inquiry be made, to disclose every fact within his knowledge which is material to the risk. But this doctrine cannot be applicable, at least not in its full extent, to policies *against fire*. If a man is content to insure my house without taking the trouble to inquire of what materials it is constructed, how it is situated in reference to other buildings, or to what uses it is applied, he has no ground for complaint, that the hazard proves to be greater than he anticipated, unless I am chargeable with some misrepresentation concerning the nature or extent of the risk. It is, therefore, the practice of companies which insure against fire, to make inquiries of the assured, in some form, concerning all such matters as are deemed material to the risk, or which may affect the amount of premium to be paid. This is sometimes done by the conditions of insurance annexed to the policy, and sometimes by requiring the applicant to state particular facts in a written application for insurance. When thus called upon to speak, he is bound to make a true and full representation concerning all the matters brought to his notice." "As the owner of a vessel and cargo," says Hibbard, J., in giving the judgment of the court in Holmes *v.* Mutual Fire Insurance Company, in Massachusetts,[2] "is generally in a position to know the character, value, and situation of the property to be insured, much better than the underwriter, his representations are received and acted upon as true; and if afterwards they turn out to be false in some matter or thing material to the risk, then, in consequence of such misrepresentation, the con-

[1] See 1 Phil. on Ins. 214, 303.

[2] Holmes *v.* Charlestown Mutual Ins. Co. 10 Met. (Mass.) R. 211.

tract is avoided, although the statement was made in ignorance or through mistake, and not from a fraudulent design. But in *fire* policies a different practice prevails, and the representations, so far as they are distinctly referred to in the policy, become parts of the contract, and are to be construed with it."

§ 152. The importance of a representation (not amounting to a warranty,) in effecting a contract of insurance, depends, as has been stated, upon its materiality, and upon a *substantial compliance* with it. The test of the materiality is the probable influence made on the mind of the underwriter in his determining to assume a responsibility he would not otherwise have assumed; if the truth had been known, it might be that the underwriter would have not either signed the policy, or would have asked a higher premium for so doing.[1] The materiality of a representation is a *matter of fact* to be ascertained by a jury. One of the conditions in a policy of fire insurance was, "If after insurance &c., the risk shall be increased by any means whatever within the control of the assured, or if such buildings or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect." It was held, it was not for the court to determine whether the risk had been increased, but that the question belonged to the jury.[2] But if the jury find the representation to be material, the consequence is *matter of law*, that the policy is void.[3] The defendant has a right to say *non in hæc*

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1 1 Arn. on Ins. 515, 522; 1 Marsh. on Ins. 450; 1 Phill. on Ins. 221; Sibbald *v.* Hill, 2 Dow. Parl. Ca. 263; Hodgson *v.* Marine Ins. Co. 5 Cranch, (U. S.) R. 109; Livingston *v.* Maryland Ins. Co. 7 Ibid, 506; Catlin *v.* Springfield Fire Ins. Co. 1 Sumn. (Cir. Co.) R. 434; Pratt *v.* Philbrook, 3 Red. (Me.) R. 411.

2 Grant *v.* Howard Fire Ins. Co. 5 Hill, (N. Y.) R. 10.

3 Ibid. Beaum. on Fire and Life Ins. 49; Hodgson *v.* Richardson, 1 Bl. R. 463; Lindenau *v.* Desborough, 8 B. & Cress. R. 586; Howell *v.*

fœdere veni.[1] The case of Carpenter *v.* The American Insurance Company,[2] affords an instance of a material misrepresentation. It was an action of assumpsit on a policy of insurance upon a factory and machinery, and it appeared that the original proposal for the insurance, which was by letter, referred the company to a description of the property at the office of another company at which it had been insured for $15,000, the property being therein valued at $20,000. The last named company, after examining the policy at the office of the first named company, declined to take the additional sum proposed, upon the ground, that the sum already insured thereon was as much as was proper to be taken on such a valuation. But, in order to induce the company to take the risk, a representation was made, that since the original insurance was effected, additions had been made to the factory &c., fully equal to $10,000, and upon the faith of this statement, the second policy was underwritten. The representation proved to be entirely untrue; and yet its materiality was held to be obvious; for it was the very point (the increased value,) upon which the policy was underwritten; and the court held, that a false representation of so material a fact, whether it was by design or by mistake, was sufficient to avoid the policy.

§ 153. In Houghton *v.* Manufacturers Insurance Company, in Massachusetts,[3] the policy which gave rise to the contro-

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Cincinnati Ins. Co. 7 Ham. (Ohio) R. 398; Fletcher *v.* Commonwealth Ins. Co. 18 Pick. (Mass.) R. 419.

[1] Per. Sutherland, J., in Inman *v.* Western Ins. Co. 12 Wend. (N. Y.) R. 400; Fowler *v.* Etna Ins. Co. 6 Cowen R. 673; Duncan *v.* Sun Fire Ins. Co., 7 Ibid. 649; Cornell *v.* Le Roy, 9 Wend. (N. Y.) R. 163; Callaghan *v.* Atlantic Ins. Co. 1 Edw. (N. Y.) Ch. R. 64.

[2] Carpenter *v.* American Ins. Co. 1 Story, (Cir. Co.) 67; S. C. 16 Peters, (U. S.) R. 495; S. C. 4 How. (U. S.) R. 185; Columbian Ins. Co. *v.* Lawrence, 2 Peters, (U. S.) R. 25.

[3] Houghton *v.* Manufacturers Ins. Co. 8 Met. (Mass.) R. 114.

versy contained this provision: If the representation made in the application by the assured for insurance, "do not contain a just, true, and full exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured so far as the same are known to the applicants, and are material to the risk, or if the situation or circumstances affecting the risk thereupon shall be altered or changed, by or with the advice, agency, or consent of the assured, or their agent, so as to increase the risk thereupon, without the consent of this company, this policy shall be void." There were annexed to the application of the assured various questions by the underwriters, and a notice that it was expected that the answers thereto would meet the requirements of the underwriters' office; one of which requirements was, that an examination should be had of the insured premises thirty minutes after work. Among the written answers to said questions were these: The factory is worked from "five o'clock A. M. to eight and one half o'clock P. M. Sometimes extra work will be done in the night." "No watch is kept in or about the building; but the mill is examined thirty minutes after work." It was adjudged, *first*, that the representations of the assured were legally adopted and embodied in the policy, as part of the contract, to the same effect as if they had been therein set forth at large. *Secondly*, that although the answers of the assured were representations rather than warranties, and were, therefore, sufficient, if the statements therein, of the facts relied on as the basis of the contract, were made in good faith, and were substantially true and correct, as to existing circumstances, and were substantially complied with, so far as they were executory, yet that, subject to this qualification, it was a *condition precedent* to the liability of the underwriters, that the answers should contain a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured, so far as known to the assured, and material to the risk. *Thirdly*, that, although the assured were themselves the owners and occupants of the property insured, and made the application for insurance, yet the question whether

they knew certain facts and circumstances respecting it, which were omitted, or not accurately stated, in their answers, was a question of fact to be left to the jury. *Fourthly*, that the representations made by the assured, as to certain usages and practices observed at the factory, concerning the modes of conducting their business, and the precautions taken to guard against fire, amounted to a stipulation that such modes of conducting their business should substantially continue to be adopted, and such precautions substantially continue to be taken during the term of insurance; and that a discontinuance thereof by the assured, or by those entrusted by them with the management of the property, without the consent of the underwriters, would render the policy void, by virtue of the proviso therein respecting an alteration or change in the situation or circumstances affecting the risk. *Fifthly*, that the answers of the assured were to be construed with reference to the requirements of the underwriters as specified in the notice accompanying the questions; and that a mere literal conformity and compliance would not be sufficient. *Sixthly*, that the assured were bound by their representation, that the mill was examined thirty minutes after work, to make such examination thirty minutes after the extra work, as well as after the other work. *Seventhly*, that the question, what is a cessation of work at the factory, from which the thirty minutes are to be computed, is a question for the jury under all the circumstances of each particular case.

§ 154. If every, the least *alteration* or *enlargement* of a building insured against fire, is necessarily, and of course *material* to the risk, and whenever it is made by the consent of the assured it is to vacate the policy, unless it should be renewed by the insurer; a restraint so stringent as that would place contracts of this sort in a state of complete uncertainty; and would render them so inconvenient as to prevent them entirely.[1] In Stetson *v.* The Massachusetts Mutual Fire

[1] 1 Marsh. on Ins. 335; Curry *v.* Commonwealth Ins. Co. 10 Pick. (Mass.) R. 535.

Insurance Company, in Massachusetts,[1] it was contended, that the enlargement of a building, represented to be contiguous to other buildings on *one* side only to the effect of making it contiguous on *two* sides, is a material alteration, under all possible circumstances, and should, therefore, discharge the policy; that, in fact, it must be considered in the light of a departure from a voyage described, in a marine insurance, and must have a similar effect upon a policy of insurance against fire. Sewall, J., said, — "The true reason why, in a case of marine insurance, a deviation discharges the insurer, is not the increase of the risk; but that the party contracting has voluntarily substituted another voyage, for that which was insured;[2] this change of the voyage determines the contract from the time it happens. *The same strictness is not requisite in an insurance against fire*, where the building, although enlarged and repaired, remains the same; and it is only necessary to guard the insurer from an *increase of his risk*, by an alteration of the building insured. And if an alteration of the kind alleged in this case may be made, under any circumstances, without increasing the risk of the insurer, there can be no reason, upon general principles, that it should determine the policy. Suppose, for instance, the subject of the insurance to be a wooden building, separated at the distance of a few feet from a brick wall in another building, and to be enlarged and made contiguous to the brick wall; it is obvious that such an alteration may diminish, and not increase the risk. And if this may be reasonably supposed in any case, then whether the enlargement of a building insured has increased the risk of the insurer, is *a question of fact*, to be determined by the jury." [3]

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[1] Stetson *v.* Massachusetts Mutual Fire Ins. Co. 4 Mass. R. 330.

[2] See 1 Marsh. on Ins. 394.

[3] By the majority of the court, it was held, that the replication to the plea of the defendants, that before the making of the policy declared on, the plaintiff in his proposal for insuring his house, described it, in its relative situa-

§ 155. It is understood in England, that although a strict and literal compliance with the terms of *warranties* be neces-

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tion as to other buildings, as connected on one side only, &c., which replication was, that after the policy was made, and before the premises were destroyed by fire, they were not repaired, or enlarged, or altered *in such a manner as to render the risk of their being consumed by fire greater*, was good and sufficient in law. Parsons, C. J., had been of counsel in the cause and gave no opinion. Parker, J., concurred. Sedgwick, who was not present in court, did not perfectly concur in the opinion which had been delivered, and the reporter was favored by the learned Judge with the following note of the grounds of his opinion. "When the plaintiff applied to the defendants to insure the property, for the destruction of which this action is brought, the representation which he made, and which was required by the rules of the company, was, doubtless, intended to enable them to contract understandingly, and on equal terms with the plaintiff. By that representation it appears — and so was the fact — that the insured premises were, at that time, connected with other buildings on one side only. Had they been so connected in other parts, no reasoning is necessary to show that danger from fire would have been thereby increased, and that, therefore, a higher premium would have been demanded for the insurance. Independent, then, of any express stipulation, if, by any future event, authorized or permitted by the insured, there was a material alteration in the state of the insured property, whereby the danger of destruction by fire was increased, — it is dictated by reason and justice that the defendants should thereby be discharged. But in this case, it is not necessary to rest on the reason of the thing. The meaning is rendered very apparent by what is explicitly declared. For it being stipulated in the 8th article of the rules and articles of the company, that 'no alterations in terms of insurance shall be made on account of a building's being made more or less hazardous by means not under the control of the insured,' it is rendered certain, without referring to other articles, by which the same is implied, that *the terms of insurance shall be altered, whenever a building is rendered more hazardous by means under the control of the insured;* or, in other words, that the contract shall not, without such alteration, be binding on the insurers. There can, then, be but two questions, that I can perceive, to decide this cause. 1. Was this building, by an alteration, rendered *more hazardous* after the contract? And if so, 2. Was that alteration made by means under the control of the insured? 1. As to the first question, at the time of the insurance the property insured was connected on one side only with other buildings; and it is agreed, that afterwards, and before the fire, alterations were made, 'by means of which

sary in construing the meaning of the parties, the courts apply no artificial rule, but expound them according to their ordinary meaning. Thus, where premises were described as being of a class wherein no fire was kept and no hazardous goods were deposited, and the insurance was made subject to a condition, that "if buildings of any description insured

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the insured building became connected on two sides with other buildings, whereas, at the time the policy was effected, the said building was connected with others on one side only.' Did this increase the hazard? To my mind, no reasoning can render more clear the proposition, *that in a populous town, a building connected with others on two sides is more exposed to fire than if connected on one side only.* It is, then, as I conceive, most certain, that, after the policy was made, the hazard of destruction by fire was increased. 2. Was this increase of hazard by means under the control of the insured? By the state of facts existing at the time of the contract, this must be determined, unless an alteration takes place, by means which the insured could not have controlled. In this case, the land, on which the building connecting the insured building after the contract with other buildings, was, at the time of effecting the policy, the property of the plaintiff. He could, therefore, prevent *that* building from being erected. If it was erected by another, in consequence of an alienation of the land on which it was erected, then the means of erecting it was the alienation, which might have been omitted; and of consequence the erection itself might have been controlled by the plaintiff. It does, on the whole, appear most clear to me, that after the policy was made, the hazard of destruction by fire was increased by means which might have been controlled by the plaintiff, and that thereby the contract of the defendants is discharged. Nor do I think that the plaintiff is aided by the verdict. The verdict has found, it is true, that the premises were not repaired or enlarged, *whereby the risk by fire was rendered greater.* The jury, it seems to me, by the verdict have found only the legal inference. From the nature of the contract, in relation to the subject-matter, the question was, whether the hazard had been increased by means under the control of the plaintiff. Now, there has been erected, by means under his control, a building connecting the insured premises with buildings with which it was not connected at the time of the contract; and the inference is, in my opinion, irresistible, that thereby 'the risk by fire was rendered greater.' The issue, therefore, on which the verdict was rendered, was, I think, immaterial, and so the finding of the jury ought not to conclude the parties against the truth of the facts." See Curry *v.* Commonwealth Ins. Co. 10 Pick. (Mass.) R. 535.

with the company should, at any time after the insurance, be made use of to stow or ware-house any hazardous goods," without leave, the policy should be avoided, Lord Tenterden, C. J., held, that this must be understood as forbidding only the habitual use of fire, or the ordinary deposit of hazardous goods; and not their occasional introduction for a temporary purpose connected with the occupation of the premises. He, therefore, directed the jury, that the lighting of a fire, and the introduction of a tar barrel into the building, which was described as a barn, for the purpose of tarring it, in the course of repairs, was no breach of the condition, notwithstanding the destruction of the building arose from the boiling over of the tar, and its communication with the barrel.[1]

§ 156. The case just cited was referred to as an authority by Tindal, C. J., in Pim *v.* Reid.[2] By the decision in this case, it appears, that provisions guarding against the contingencies of alterations of buildings, and of the kind and mode of business, and of the introduction of more dangerous articles, *when inserted in policies*, will be construed strictly; yet if the assured be not restrained by the conditions from applying the property to uses pregnant with danger so long as he acts *bonâ fide*, he may, after the granting of the policy, carry on any new trade, or introduce dangerous goods upon his premises as their place of deposit, without forfeiting his insurance.[3] It appeared that the plaintiffs in this case, effected insurance subject (*inter alia*) to the following conditions. "In the insurance of goods &c., the building or place in which the same are deposited is to be described, the quantity and description of such goods, also whether any hazardous trade is carried on, or any hazardous articles deposited therein; and if any person shall insure his goods or buildings and shall cause the same to be described otherwise than they really are,

[1] Shaw *v.* Robberds, 6 Ad. & Ellis, R. 75.

[2] Pim *v.* Reid, 6 Man. & Grang. R. 1.

[3] See Dowd. on Life and Fire Ins. 104.

to the prejudice of the company, or shall misrepresent, or omit to communicate any circumstance which is material to be made known to the company, in order to enable them to judge of the risk *they have undertaken*, or are required to undertake, such insurance shall be of no force." It was held, that this condition was to be referred to the time when the policy was effected, and that, in the absence of fraud, neither by the general law of insurance, nor by such condition, was the policy avoided by the circumstance that subsequently to the effecting of the policy, a more hazardous trade had, without notice to the company, been carried on upon the premises. The only words that raised any doubt were these: "or shall misrepresent, or omit to communicate, any circumstance which is material to be made known to the company, in order to enable them to judge of the risk *they have undertaken;*" and, looking at the whole condition, it clearly referred to time present. "Misrepresentation" must necessarily do so; and the term, "omit to communicate," which merely points to a *suppression* of facts, as contradistinguished from *misrepresentation*, cannot be referred to a different period.[1]

§ 157. In Dobson *v.* Sotheby,[2] the action was brought on a policy of insurance effected upon a "barn, situate in an open field, lumber built, and tiled. The conditions indorsed on the policy, required the usual descriptions of the property. The policy was effected at the lowest rate of premium, such as is only payable for buildings of a certain description, where no fire is kept, and no hazardous goods deposited. There were articles fixing a higher rate of premium for buildings of other descriptions, with the same proviso against hazardous goods; and a proviso, that "if buildings of any description insured with the company, shall at any time after

1 See following Chap.

2 Dobson *v.* Sotheby, 1 M. & Malk. R. 90, and cited *ante*, § 98. And see Marsh. on Ins. 450; De Hahn *v.* Hartley, 4 T. R. 345; Pawsen *v.* Watson, Cowp. R. 785.

such insurance, be made use of to stow or warehouse any hazardous goods," without leave from the company, the policy should be forfeited. The premises were agricultural buildings, but not such as were strictly to be described as a *barn*, but they were of such a nature that they would have been insured by the company at the same rate, if they had been more accurately described. They required *tarring*, and a fire was consequently lighted in the warehouse, and a tar-barrel was brought into the building for the purpose of performing the necessary operation. By Lord Tenterden, C. J., "The word *barn* is not the most correct description of the premises, but it would give the company substantial information of their nature; there would be no difference in their risk, and the insurance would have been at the same rate, whether the word *barn*, or a more correct phrase had been used; I think, therefore, that they are substantially well described. Nor do I think that the other circumstances relied on furnish any answer to the action. If the company intended to stipulate, not merely that no fire should habitually be kept on the same premises, but that none should ever be introduced upon them, they might have expressed themselves to that effect; and the same remark applies to the case of hazardous goods also. In the absence of any such stipulation, I think that the condition must be understood as forbidding only the *habitual* use of fire, or the *ordinary* deposit of hazardous goods, not their occasional introduction, as in this case, for a temporary purpose, connected with the occupation of the premises. The common repairs of a building necessarily require the introduction of fire upon the premises, and one of the great objects of insuring is security against the negligence of servants and workmen." [1]

§ 158. It may be considered to be perfectly well settled in this country, that a representation, forming no part of the

[1] See *ante*, § 111, and 122, *et seq.*; see 6 Taunt. R. 436.

policy, will, in the absence of actual fraud, be satisfied with a *substantial* compliance, and shall not be deemed falsified, unless departed from in some material point.[1] The court, in Jefferson Insurance Company *v.* Cotheal,[2] say, by Sutherland, J., — "Although the description in the representation may differ very considerably from the actual state of the property insured, if such variation were not fraudulently intended, and did not in fact affect the rate of insurance, or change the actual risk, it can scarcely be deemed material." A representation is substantially complied with by the adoption of precautions, which, if not those exactly stated in the application, they may be such precautions as tend to accomplish the same purpose, and which may be considered equally efficacious. For example, when it is stated, that "ashes are

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[1] 1 Arn. on Ins. 520; 3 Kent Comm. 449; Suckley *v.* Delafield, Caines, (N. Y.) R. 222. Mr. Justice Woodbury, in stating the distinction between warranties and representations, says, the former bind the party to them as a condition precedent, whether material or not; while the latter bind only to *substantial* or virtual compliance. Clark *v.* Manufacturers Ins. Co. 1 Wood. & Min. (Cir. Co.) R. 487.

[2] Jefferson Ins. Co. *v.* Cotheal, 7 Wend. (N. Y.) R. 72. Sutherland, J., who delivered the judgment of the court in this case, referred, as applicable to it, to the cases of Durnell *v.* Boderly, 1 Holt's N. P. Ca. and Berthon *v.* Loughman, 2 Stark. N. P. Rep. 288. They were directly in conflict with each other. In the first case, it was held, that the opinion of underwriters, whether upon certain facts being communicated to them, they would or would not have insured the particular voyage, could not be received as evidence; that the materiality of the intelligence or rumors which the assured was charged with having suppressed, was a question for the jury, under the circumstances of the case, and ought not to rest upon the opinion of mercantile men. In the other case, Holroyd, J., permitted a witness who was conversant with the business of insurance, to give his opinion as a matter of judgment, whether the communication of particular facts would have enhanced the premium. The two cases are irreconcilable in principle; and Mr. Justice Sutherland, it seems, concurs in the decision in the case first mentioned. See Jolly *v.* Baltimore Fire Ins. Society, 1 H. & Gill. (Md.) R. 295. Curry *v.* Commonwealth Ins. Co. 10 Pick. (Mass.) R. 539.

taken up in *iron* hods," it would be a substantial compliance, if *brass* or *copper* were substituted. So when it is represented that casks of water with buckets, are kept in each story, if a reservoir placed above, with pipes to convey water to each story, and found by skilful and experienced persons to be equally efficacious, it would be a substantial compliance.[1]

§ 159. The case before cited of Houghton *v.* Manufacturers Mutual Fire Insurance Company,[2] as an illustration of the point under consideration, was referred to as authority in Underhill *v.* Agawam Mutual Fire Insurance Company,[3] in which it was held by the court, that it is not necessary to conform to the precise letter of the application as to the mode of conducting all the various details of an establishment; and that other modes equally safe may be used; and that hence, if in an application for insurance against fire, the stipulation is, that ashes are kept at all times in brick, it is complied with if the ashes are kept in some mode equally safe. In contrast with this case is the case of Murdock *v.* Chenango Mutual Fire Insurance, in the State of New York.[4] In this case an application was referred to in a policy as forming a part thereof; and it was stated thus: "there is one stove [in the building insured,] pipe passes through the window at the side of the building; there will, however, be a stone chimney built, and the pipe will pass into it at the side." This seems to have been deemed to be a warranty that the chimney should be built within a reasonable time, and that a violation of the engagement would avoid the policy; and if, after the insurance, the stove was removed to another part of the building, and the pipe passed through a stove fixed in the roof, the secretary of the company signed a written consent in

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[1] Per Shaw, C. J., in Houghton *v.* Manufacturers Ins. Co. 8 Met. (Mass.) R. 122.

[2] *Ante*, § 153.

[3] Underhill *v.* Agawam Mutual Fire Ins. Co. 6 Cush. (Mass.) R. 440.

[4] Murdock *v.* Chenango Mutual Fire Ins. Co. 2 Comst. (N. Y.) R. 210.

these words, — "consent is given, that the within policy remain good, notwithstanding the stove has been removed;" this is no waiver of the undertaking to build the chimney. The assured unquestionably had abundant time to perform the work he stipulated to do before the fire, which occurred nearly three years after the date of the policy.

§ 160. In Fowler *v.* Etna Fire Insurance Company,[1] which was an action of assumpsit against fire, wherein it appeared, that the policy described the subject insured, as the stock in trade of the assured, contained in a two story frame house *filled with brick*, No. 152 Chatham Street; it was held, that the house, No. 152 Chatham Street, being a frame house *not* "filled with brick," the policy was void.

§ 161. Where the conditions required the application to state for what purpose the insured property was occupied, and in the application it was only called a *grist-mill*, and it was proved, that *carpenters' work* was accustomed to be done in it, with instruments and fixtures which were kept there; it was held, that the policy was, in consequence, void.[2]

§ 162. In a policy of insurance, a specification of hazards is followed by a provision that any increase of risk, within the control of the assured, shall vacate the policy; this provision is not restricted by the previous specification so as to make the insurer a special contractor under the specification. There is no reason for swerving from the literal and plain import of a condition, which at the same time preserves a fundamental, if not an indispensable law of insurance, that protects the insurer against the conduct of the assured in increasing the risk.[3] But if there be no stipulation in respect

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[1] Fowler *v.* Etna Fire Ins. Co. 6 Cowen, (N. Y.) R. 673.

[2] Jennings *v.* Chenango County Mutual Ins. Co. 2 Denio, (N. Y.) R. 75.

[3] Boatwright *v.* Etna Ins. Co. 1 Strob. (S. C.) Law R. 281.

to increase of risk, by the erection of adjacent buildings, a prohibition of so important a character is not to be implied; and the policy is not rendered void by the subsequent erection of buildings adjacent to the one insured. At the same time, it by no means follows, that the insurers are compelled to bear any loss, which may be the result of such an act on the part of the assured. In Stebbins *v.* The Globe Insurance Company,[1] the company offered to prove, that subsequently to the insurance the plaintiff had erected other buildings, immediately contiguous to the store insured, and upon the ground represented as vacant, and that the risk of loss was thereby increased. The Judge rejected the evidence, unless the defendants meant to show, that the intention of the plaintiff, at the time of insuring, was to erect those buildings, and that he had concealed that intention, or that the fire was occasioned by, or originated in, the adjacent buildings so erected. To this decision the defendants excepted, and the first and principal question arising in the case was, whether the fact offered to be proved, would have avoided the policy. By Oakley, J., — "The contract of insurance has its foundation in the mutual good faith of the parties. If the assured violates that good faith, in any circumstance entering into the creation of the contract, it is no doubt void. But if, subsequently to its formation, he acts with fraud, or gross negligence, or in bad faith with respect to the subject-matter insured, his rights under the contract are not impaired, unless the loss, which he seeks to recover, is the result of his own misconduct. It is a general principle, that no man can derive a right of action against another, from his own violation of duty, or from his own illegal acts. Thus, there is no stipulation in this policy, that the assured shall not set fire to the buildings insured. If he had done so, he could not recover the loss, on the ground, not that he had violated any stipulation in the contract, but he could not profit by the consequences of his own

[1] Stebbins *v.* Globe Ins. Co. 2 Hall, (N. Y.) R. 632.

illegal or fraudulent acts. If, however, he had set fire to an adjoining building with an intention to consume the one insured, but no injury to that had in fact ensued, it could not have been contended that the policy was thereby rendered void; notwithstanding the act would have been in the highest degree a violation of the good faith which was pledged to the insurers, that the risk should not be increased by any act of the assured. An erection of buildings on vacant ground by the assured, subsequently to the policy, and contiguous to those insured, whereby the risk is increased, stands upon the same principle. If buildings thus erected, should be removed before the occurrence of any loss, it could not be maintained that the policy would be thereby annulled. The act not being in violation of any express stipulation in the policy, and not resulting in any actual injury to the insurers, the law would regard it as harmless and rightful; and if this be so, it seems clearly to follow, that the continuance of such erections (as in the case now before us,) until the fire, cannot change the legal consequences of the act erecting them, if they have in no way been the cause of the loss. The act of the assured in erecting them, may have been a breach of an implied understanding between the parties, that the situation of the insured premises, with respect to the contiguous buildings, should not be changed by the act of the assured so as to increase the risk; but if such increase of risk, has in fact, been without injury to the defendants, I hold that the policy is not affected by it."

§ 163. Where, in a policy of fire insurance on sundry buildings, they were described as "barns," to which this clause was added, — "all the above-mentioned barns are used for hay, straw, grain unthreshed, stabling, and shelter;" and on the trial, after proof of a loss by fire, it appeared, that on the day preceding the night of the fire, the assured had caused about two bushels of lime and six or eight pails of water to be placed in a tub standing in a room generally used for keeping therein unthreshed corn, in one of the barns, for the purpose

of preparing the lime for rolling in it some wheat which he was about to sow upon his farm; that a short time previous to the fire he had commenced the painting of his house, and his painter had mixed his paints in the same room, and at the time of the fire, there were in it an oil barrel containing about a gallon of oil, a keg of white lead, and a pot with about a pint of mixed paint; that in another building described in the policy, as used in part for a cider mill, the assured, before and after the execution of the policy, had been in the habit of repairing his farming utensils, and had also made a bee-hive, and planed some boards for a room in his house; but a day or two before the fire, the building had been cleared out, leaving nothing in it but some apples; it was held, *first*, that the clause relating to the use of the buildings insured, was not a warranty that they should be used in that manner, and in no other, but was inserted merely for the purpose of designating the buildings insured, and not to limit their use, or to deprive the assured of the enjoyment of his property in the same manner as buildings of that description are generally used; and *secondly*, that the acts of the assured, so far as they were or could have been the cause of the loss, were in accordance with the ordinary use of such buildings by farmers.[1]

§ 164. In Grant *v.* Howard Insurance Company,[2] the building insured against fire, was undergoing repairs at the time of its destruction by fire, and the principal question in the case was, whether such repairs were included in the memorandum of special rates. One provision was, that in case the *building* should be *appropriated, applied or used to or for the purpose of carrying on or exercising therein any trade, business or vocation*, denominated hazardous or extra-hazardous, or *specified in the memorandum of special rates*, the policy should be of no effect so long as the building should be so appropriated,

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[1] Billings *v.* Tolland County Mutual Fire Ins. Co. 20 Conn. R. 139.

[2] Grant *v.* Howard Ins. Co. 5 Hill, (N. Y.) R. 10.

applied, or used. The memorandum referred to specified "houses building or repairing;" and it was insisted that the repairs in this case came within the last branch of this clause, namely, *house repairing*. But the court thought otherwise, and were of opinion that the clause, taken in connection with the provision in the policy, related to carrying on the trade or occupation of house building and house repairing in or about the building insured, and not to the repairs of the particular building itself. "It would," said the court, "be perverting a very plain and explicit provision of the contract, to apply either branch of the phrase 'houses building or repairing,' to the subject of the insurance itself; and in respect to the first branch, such an application would be especially absurd and nonsensical, for it would amount to a prohibition against building a house already built."

§ 165. A description of a room as a store-room for painted ware was contained in the application for insurance, or in the report or survey made upon the buildings insured; but it did not appear in the policy itself, nor was the report or survey, or the application containing it, annexed to the policy. It was therefore held not to be a warranty; but that it might, on the general principles of insurance, be taken to be a representation; and considered in that light, if material and falsified, it would vitiate the insurance. "It is conceded," said C. J. Jones, "that a representation, if it be not fraudulent, and does not tend to increase the risk of the insurer, will not avoid the policy, but that it will be sufficient to comply with it *in substance*, or to show that it has not been departed from to the material injury of the insurers. I assume that the plaintiff did represent the room, on the smaller plan or survey, which I take to be his application for insurance, as intended for a store-room for the reception of the painted ware when finished, and I assume that this representation, whether the plan in which it appeared was the application for insurance, or a survey of the building, was before the insurers when they took the risk, and may have entered into their estimate of the

rate of premium. And the question on these assumptions will be, whether the occupancy of that room by the *carpenter*, with his materials and tools, as disclosed by the evidence, did materially falsify the representation, and increase the risk of the insurers? The proof of its materiality was upon the underwriters, who make the defence. I discover no evidence in the case of the point; and the failure of proof is decisive against the objection. . The risk incurred by the occupancy of that part of the building by the carpenter, if it in reality did enhance the risk, was susceptible of proof, and it was indispensably necessary to show it, in order to render the defence available. Unless, therefore, the necessity of extrinsic and real proof of this fact was superseded, or the absence of such proof was supplied by the internal evidence deducible from the policy, or its accompanying conditions of insurance, this ground of defence cannot prevail." [1]

§ 166. Suppose that it be provided in a policy of fire insurance, that the policy shall be void if "the risk shall be increased by any means whatsoever, within the control of the assured, or if such building or premises shall, with the assent of the assured, be occupied in any way so as to render the risk more hazardous than at the time of insuring;" and among the articles denominated "hazardous," is cotton in bales; if the cotton in bales is merely kept for sale as a part of the stock of dry goods, it does not vitiate the policy; that is, if, in the opinion of the jury, the keeping of such cotton does not increase the risk. The restriction in the policy does not extend to the keeping of a single article denominated "hazardous," or "extra-hazardous," as a part of the dry goods stock in trade, provided the store has not been appropriated or used for purposes not intended by the language of the policy; when those purposes are of a general nature, and

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[1] Delonguemare *v.* Tradesman Ins. Co. 2 Hall, (N. Y.) R. 589.

distinguished from that of keeping a stock of dry goods for sale.[1]

§ 167. If alterations and additions are *per se* a change of the risk, it would follow, that the erection of a parapet wall in a city, a substitution of a brick for a wooden floor, or a marble for a wooden mantlepiece, or the introduction of a coal grate into a chimney constructed for wood as the only fuel, though lessening the risk, would discharge the policy; as, according to the principle of maritime insurance, every *change* of the risk exonerates the insurer, whether the damage be increased or diminished. "To infer," said Dorsey, J., in delivering the opinion of the Court of Appeals in Maryland,[2] "without any express provision or necessary implication arising out of the contract itself, or public policy demanding it, that the assured surrendered all right to make such common-place, trivial, and unimportant additions to, and alteration of, his property, as its safety or his convenience or comfort might suggest, is a construction too rigorous to be rational, the effect of which would be to render worse than useless those most useful and indispensable institutions in populous cities — the Fire Insurance Companies — and give a fatal stab to our enterprising manufactures. Who, if suing for a loss under a policy covering the manufactory and machinery, would be turned out of court without remedy or hope, if perchance the insurer could prove that the most immaterial alteration or improvement were made in his machinery by substituting the power of the screw, for that of the lever, the leather strap for the iron wheel, or the iron, for the wooden shaft. But suppose all the rules of marine insurance applicable to the question at bar, can a case be found in which it was ever con-

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[1] Moore *v.* Protection Ins. Co. 16 Shep. (Me.) R. 97.

[2] Jolly *v.* Baltimore Equitable Fire Ins. Society, 1 H. & Gill. (Md.) R. 295.

tended, that to add to the equipment of a vessel insured, a yard more of canvass, or an additional cleet or clew line, was to vacate the insurance?" If a building is painted white when insured, it would obviously not be necessary for the assured always to keep it of that color; and the obligation of the insurer would not be at an end as soon as the paint had become worn off and gone.[1]

§ 168. There was an express provision in the policy against loss or damage by fire, in the case of the New York Equitable Insurance Company,[2] that if the building insured should, at any time during the continuance of the policy, be appropriated, applied, or used, to or for the purpose of carrying on any trade, business, or vocation, *denominated hazardous or extra hazardous, or specified in the memorandum of special rates in the proposals annexed to the policy*, or for the purpose of *storing therein* any of the articles, goods, or merchandise, in the same proposals denominated "hazardous," or "extra hazardous," or included in the memorandum of special rates, the policy should cease and be of no effect. It was held, that the trade or business of a *grocer* not being mentioned or specified in the proposals annexed to the policy, was not prohibited. In respect to the term "storing," the question was whether the keeping of *oil* and *spiritous liquors* in the store, under the circumstances, was using the building for the purpose of "storing" those articles within the meaning of the policy, and Sutherland, J., in behalf of the court, said, — "Every thing that was kept, either in the store or cellar, was kept for the purpose of being retailed; the smaller vessels in the store were replenished from the larger ones in the cellar, which consisted, at the time of the fire, of one cask of oil, one barrel of rum, one cask of Jamaica spirits, and one pipe of gin; from all of which more or less had been drawn for the use of the store.

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[1] Per White, C. J., in Billings *v.* Tolland Co. Mutual Ins. Co. 20 Conn. R. 139; and *ante*, § 163.

[2] New York Equitable Ins. Co. *v.* Langdon, 6 Wend. (N. Y.) R. 623.

It appears to me that the word "storing" was used by the parties in this case in the sense contended for by the plaintiff, namely, a keeping for safe custody, to be delivered out in the same condition, substantially, as when received; and applies only where the storing or safe keeping is the sole or principal object of the deposit, and not where it is merely incidental, and the keeping is only for the purpose of consumption. If I send a cask of wine to a warehouse to be kept for me, that is a *storing* of it; but if I put it into my cellar or my garret to be drawn off and drank, I apprehend the term would not be considered as applying. Suppose all the varieties of wine were denominated "hazardous," by the various insurance companies, and the *storing* of them was prohibited in their policies; could it possibly apply to the private stock which a gentleman might keep in his own house, for his own use and consumption? It certainly would be perverting the term from its ordinary and generally received acceptation." [1]

§ 169. On the principle, that conditions are to be construed strictly against those for whose benefit they are introduced when they impose burthens on other parties, is it, that if the words in a policy of insuranee against fire, describe the house as "at present occupied as a dwelling-house, but to be occupied hereafter as a tavern, and *privileged as such*," there is no warranty that the house shall, during the continuance of the risk, be constantly occupied as a tavern, but that it is at farthest, a mere representation of the intention to occupy it as such, and a license or privilege granted by the underwriters, that it may be so occupied.[2] But if the stipulation had been that the house should not be occupied as a tavern, it would have been a warranty.[3]

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1 2 Hall, (N. Y.) R. 226.

2 Catlin *v.* Springfield Fire Ins. Co. 1 Sumn. (Cir. Co.) R. 434.

3 In the Circuit Court, St. Louis, Missouri, 1852, before Judge Hamilton. James Lawless *v.* Tennessee Marine and Fire Insurance Company. The action was upon a policy of insurance dated March, 1850, by which the

§ 170. Where the premises were described as occupied by a certain individual as a private residence, it was held, that this did not amount to a warranty of the continuance of the occupation during the risk, and therefore, that the insurers were liable, although before the loss the occupant had removed

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defendants caused the plaintiffs to be insured, for one year, for the sum of $1,000, "on brick warehouse on Water street, between Morgan and Green streets, in block 15, St. Louis, to be occupied as three stores, but not as coffee-houses."

The property was destroyed by fire in October, 1850, during the existence of the policy. The defendants admitted the execution of the policy, the destruction of the property, and the proofs of the loss, but set up as a defence, that before and at the time of the fire one of the tenements was occupied as a coffee-house, and that another was occupied as a rectifying establishment, and for distilling cordials, in which business fire-heat was used. Upon the trial of the cause, the defendant proved that previous to, and at the time of the fire, one of the tenements was occupied by Philip Rock, as a coffee-house, although the fire originated in the next tenement, used for rectifying spirits, and not in the coffee-house; and thereupon prayed the court to instruct the jury, that if, previous to, and at the time of the fire one of the tenements was used as a coffee-house, then the jury must find for the defendant — contending that the words used in the policy were equivalent to a warranty that the property should not be used as a coffee-house during the existence of the policy, and consequently that it mattered not whether the plaintiff was cognizant of the use of the property or not. The plaintiff's counsel contended that the words used in the policy were mere words of description, and showed merely the intended use of the property, but did not amount to a warranty that the use of the property should not be changed, nor that a coffee-house should not be kept in them. The court sustained the construction contended for by the defendants, holding that the words "not to be used for coffee-houses," were equivalent to a warranty that the premises should not be used for that purpose, and that although as a general rule the words of description in a policy would not be considered as words of warranty, yet the use of the negative words "not to be used," left no room for that construction; that that particular use of the premises was intended to be forbidden by the policy, and that those words must be construed as words of warranty. The court therefore gave the instruction asked by the defendant's counsel, and the jury found a verdict for defendant. Lawless *v.* Tennessee Marine and Fire Ins. Co., Hunt's Merchants' Mag. for Feby., 1853, p. 205.

and left the premises vacant. It was considered by the court in this case, that there was nothing in the contract of insurance, or in the evidence, to show that the hazard on the house was greater when vacant than if it had been occupied; the rate of insurance not being made usually to depend on such a circumstance, and the continuance of the tenant's occupation not being embraced within the words of the warranty, and not being manifestly material to the risk, could not be brought within it by inference or implication.[1]

§ 171. In New York, fire insurance companies make a classification of hazards in reference to the materials and construction of the buildings insured, or in which the subject-matter of the insurance is deposited or kept, and in reference to their location and the manner in which they are occupied; and their rates of premium are usually regulated accordingly. A false or mistaken representation, therefore, from which the underwriters might be induced to suppose that the risk belonged to a lower instead of a higher class of hazards, would, if caused by the fraud, or even mistake, of the assured or his agent, be sufficient to avoid the policy. But in reference to all matters of minor importance, such as whether the building is a few feet more or less near an adjacent building, or whether the rooms, partitions, staircases, &c., are precisely stated by the assured, it must always be a mere question of fact to be determined by the jury whether the misrepresentation be fraudulent, or materially varied the nature of the risk to the prejudice of the insurer; unless he thinks proper to put it in the shape of a warranty, and thus make it a part of the contract, that the assured shall not be paid his loss, if there be any, even an unessential variance from the description of the property, or its location as to the buildings, &c.[2]

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[1] O'Neil *v.* Buffalo Fire Ins. Co. 3 Comst. (N. Y.) R. 122; and see Curry *v.* Commonwealth Ins. Co. 10 Pick. R. 535.

[2] Farmers Ins. & Loan Co. *v.* Snyder, 16 Wend. (N. Y.) R. 480.

CHAPTER VII.

CONCEALMENT.

§ 172. We have already been prompted incidentally to suggest, that there must be the most perfect fairness, in obtaining a policy of fire insurance, in *disclosing* all circumstances material to the risk, and also, that even the reasonable grounds of apprehension on the part of the assured must be stated; that the insurer must be supposed to take the risk on the supposition that *nothing unusual* exists.[1] "The contract of insurance," says Ch. Justice Marshall, "is one in which the underwriters generally act on the representation of the assured; and that representation ought consequently to be fair, and to *omit nothing* which it is material for the underwriters to know." [2]

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[1] See *ante*, § 110, referring to Bufe *v.* Turner, 1 Marsh. R. 46, and 6 Taunt. R. 338; and Clark *v.* Manuf. Ins. Co. 8 How. (U. S.) R. 535. Upon this important point, see also 1 Bell, Comm. 338; 1 Arn. on Ins. 536; 3 Kent, Comm. 449; Child *v.* Sun Mutual Ins. Co. 3 Sand. (N. Y.) Sup. Co. R. 26; Fletcher *v.* Commonwealth Ins. Co. 18 Pick. (Mass.) R. 419.

[2] Columbian Ins. Co. *v.* Lawrence, 2 Peters, (U. S.) R. 25, 49; and see Jackson *v.* Phœnix Ins. Co. 1 Wash. (Cir. Co.) R. 370; Moses *v.* Delaware Ins. Co. Ibid. 385; Hubbard *v.* Coolidge, 2 Gallis. (Cir. Co.) R. 353; Baxter *v.* New England Ins. Co. 3 Mason, (Cir. Co.) R. 96. The doctrine on this subject is thus stated by Lord Mansfield in a case which was an action on a policy of marine insurance: "Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. But either party may be innocently silent as to grounds open *to both*, to exercise their judgments upon." Again, says he, "There are many matters as to which the insured may be innocently silent — he need not mention what the under-

Concealment is regarded as a species of fraud (*suppressio veri*); so that if the assured is induced by a rumor of an attempt to set fire to an adjacent work-house, to insure his house against fire, and withheld this circumstance from the underwriters, he is not allowed to recover.[1] Where a part of the insured premises was occupied for gambling, and the insurers suggested, as an objection, the vicinity of the premises to another gambling establishment, it was held, in the State of Louisiana, that if the risk was, in the opinion of the jury, materially aggravated by such occupancy of a part of the premises, it was obligatory on the applicant to have represented the fact, and the suppression of it would defeat the policy.[2]

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writer knows." And again, — "The reason of the rule against concealments, is to prevent fraud and encourage good faith." Carter *v.* Boehm, 3 Burr, R. 1905; and see Lynch *v.* Dunston, 14 East, R. 494. In Equity, if a party, taking a guaranty from a surety, conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions as to the real state of the facts, such a concealment will amount to a fraud; because the party is *bound* to make a disclosure; and the omission to make it, under such circumstances, is equivalent to an affirmation that the facts do not exist. (Thus says Judge Story in 1 Eq. Jurisp. § 215.) That learned author then proceeds to say, — "Cases of insurance afford a ready illustration of the same doctrine. In such cases the underwriter necessarily reposes a trust and confidence in the assured, as to all facts and circumstances affecting the risk, which are peculiarly within his knowledge, and which are not of a public and general nature, or which the underwriter knows, or is bound to know." Ibid. § 216, citing Lindenau *v.* Desborough, 8 Barn. & Cress. 586, 592; 2 Kent Comm. Lect. 39, p. 448, (4th ed.); Walker *v.* Symonds, 3 Swanst. R. 62; and see Bilbie *v.* Lumley, 2 East R. 469. "Every act and circumstance," says Marshall on Insurance, "which can possibly influence the mind of any prudent and intelligent insurer, in determining whether he will underwrite the policy at all, is material." 1 Marsh. on Ins.

1 Walden *v.* Louisiana Ins. Co. 12 Louis. R. 134; and see *ante*, § 110, Bufe *v.* Turner.

2 Lyon *v.* Commercial Ins. Co. 2 Rob. (Louis.) R. 266, cited in 1 Phill. on Ins. 3d ed. 352.

§ 173. Another clear instance of concealment is presented by the case of The New York Bowery Insurance Company *v.* The New York Insurance Company. It appeared, in this case, that the plaintiffs, on learning that the owner of a house, which they had insured, bore a bad character, and that the premises in question had several times been destroyed by fire, while occupied by him, and fully insured, applied to the defendants to re-insure the property, but without communicating the information thus received, or the motives which led to the application. The premises insured were destroyed by fire shortly afterwards, and a suit having been brought upon the re-insurance, the concealment defeated the right of recovery.[1]

§ 174. In *every sort* of insurance, whether marine, fire, or life, it is held to be one of the plainest principles of equity, that a contract which one party has been induced to enter upon from his ignorance of the thing concealed, shall not be enforced against him, by the other who has concealed it. The contrary would lead to frequent suppression of information.[2] But the strictness and nicety required in questions arising on policies of marine insurance, are not, to their full extent, applicable to policies of fire insurance; the former being entered into by the underwriter almost exclusively on the

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[1] New York Bowery Ins. Co. *v.* New York Ins. Co. 17 Wend. (N. Y.) R. 359. The authors of the valuable work entitled "American Leading Cases," in reference to the decision in this case, say, (vol. 2, p. 458.) "It is obvious, that if the bad character of the party insured, can be held material to the risk, as involving the presumption that he may be led from motives of interest to connive at or bring about a destruction of the property, the question how far he is interested to pursue such a course, may also be material, (see *ante*, § 127, *et seq.*) in cases where nothing is proved as to his character, but when it may not be such as to put him beyond the reach of temptation." As to the doctrine of re-insurance, see *ante*, Intr. § 24, 25, and § 83, *et seq.* of the Treatise.

[2] See the authorities above cited; 1 Arn. on Ins. 536; Lindenaugh *v.* Desborough, 8 B. & Cress. R. 586; and see *ante*, § 151.

statements and information given by the assured himself; in the latter the underwriters assume the risk on the knowledge acquired by an actual survey and examination made by themselves, and not on representations coming from the assured.[1] The real question is, whether the special facts upon which the contingent chance is to be computed are within the knowledge of the underwriter,[2] so that, after all, there is no difference *in principle* between marine and fire policies of insurance, in regard to concealment; the question in each instance being as to an improper and unjustifiable want of disclosure. In the case of Fowler *v.* Etna Fire Insurance Company,[3] the court, by Ch. J. Savage, say, — "No cases have been produced to show that a description of property insured by a policy against fire is to be construed differently from a marine policy." No reason was perceivable, in the opinion of the court, why there should be a difference. All, it is obvious, depends upon the facts of the particular case.

§ 175. All the authorities, concerning matters of insurance, concur in the position, that if the concealment is *material* it will avoid the policy, notwithstanding the assured did not intend to commit any fraud. The *suppressio veri* may happen by mistake, and be entirely without fraudulent intention, still the underwriter is deceived, and the policy is thus void; for the reason that the risk run is really different from the risk understood and intended to be run at the time of the agreement. A concealment, which is only the effect of *accident*,

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[1] Jolly *v.* Equitable Society, 1 H. & Gill. (Md.) R. 295; 3 Kent Comm. 450; Holmes *v.* Charlestown Mutual Fire Ins. Co. 10 Met. (Mass.) R. on p. 211; see Ib. 114.

[2] Carter *v.* Boehm, 3 Burr R. 1909; Vale *v.* Phœnix Ins. Co. 1 Wash. (Cir. Co.) 283; Hazard *v.* New England Ins. Co. 1 Sumn. (Cir. Co.) R. 218; Boatwright *v.* Etna Ins. Co. 1 Strob. (S. C.) R. 281; Lindenau *v.* Desborough, 8 B. & Cress. R. 592.

[3] Fowler *v.* Etna Fire Ins. Co. 6 Cow. (N. Y.) R. 673; and see New York Bowery Ins. Co. *v.* New York Fire Ins. Co. 17 Wend. (N. Y.) R. 359; 2 Duer on Ins. 380, *et seq.*

inadvertence or *mistake*, is equally fatal to the contract as if it were designed. By a *material* fact is meant, one which, if communicated to the underwriter, would induce him either to decline an insurance altogether, or not to accept it unless at a higher premium.[1] If a party, for instance, with knowledge that his agent is in treaty for insurance, receives information of a material fact, he is bound promptly to use the means of communicating it, and his neglect thus to do will avoid the policy, independently of any proof of bad motives for the delay.[2] The question of materiality in regard to concealment, as in the case of representation,[3] is ordinarily considered proper to be left to the jury.[4] "The question," says a very learned writer, "whether the facts concealed were or were not material to the risk, is mainly a question for the jury."[5]

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[1] Opinion of Lord Mansfield in Carter *v.* Boehm, 3 Burr R. 965, cited in Ellis on Fire and Life Ins. p. 38; Hughes on Ins. 506; Blaney on Life and Fire Ins. 50; 1 Marsh. on Ins. 463; 1 Arn. on Ins. 536; 1 Phill. on Ins. 214; Beaum. on Fire and Life Ins. 48, *et seq.;* Fletcher *v.* Commonwealth Ins. Co. 18 Pick. (Mass.) R. 419; Merriam *v.* Middlesex Mutual Fire Ins. Co. 21 Pick. (Mass.) R. 162; Stebbins *v.* Globe Ins. Co. 2 Hall, (N. Y.) R. 632; New York Gas Light Co. *v.* Mechanics Fire Ins. Co. 2 Hall, (N. Y.) R. 108; Delonguemare *v.* Tradesmens Ins. Co. 2 Hall, (N. Y.) R. 589; Sexton *v.* Montgomery Mutual Ins. Co. 9 Barb. (N. Y.) Sup. Co. R. 191; Lounsbury *v.* Protection Ins. Co. 8 (Conn.) R. 459; Carpenter *v.* Providence Washington Fire Ins. Co. 16 Peters, (U. S.) R. 405, and S. C. 4 How. (U. S.) R. 185; Vale *v.* Phœnix Ins. Co. 1 Wash. (Cir. Co.) R. 284; Satterthwaite *v.* Mutual Beneficial Association, 2 Harris, (Penn.) R. 393; Kohne *v.* Ins. Co. of North America, 1 Wash. (Cir. Co.) R. 158.

[2] Neptune Ins. *v.* Robinson, 18 G. & Johns. (Md.) R. 256.

[3] See *ante*, § 152.

[4] Mechanics Fire Ins. Co. *v.* City of New York, 2 Hall, (N. Y.) R. 490; Saratoga Mutual Ins. Co. 5 Hill, (N. Y.) R. 188; Satterthwaite *v.* Beneficial Association, 2 Harris, (Penn.) R. 303; Stebbins *v.* Globe Ins. Co. 2 Hall, (N. Y.) R. 632; Mahon *v.* Mutual Ins. Co. 5 Call. (Va.) R. 517; and the authorities cited above; Gates *v.* Madison County Mutual Ins. Co. 2 Comst. (N. Y.) R. 43; Locke *v.* North American Ins. Co. 13 Mass. R. 61-68.

[5] 1 Arn. on Insurance 570; and see 3 Kent Comm. 284, and opinion of Story, J., in McLanahan *v.* Universal Ins. Co. 1 Peters, (U. S.) R. 188.

§ 176. The underwriter, it is true, is bound to know every thing that is open to his inquiry, and nothing need be disclosed which he waives being informed of.[1] The underwriter may waive the information by consenting to the insurance in the form that is proposed.[2] In Fletcher *v.* Commonwealth Insurance Company,[3] the court, say, — "The assured may well be silent as to various matters connected with, or having some relation to, the property insured, without any prejudice to his insurance; provided that such silence was not intended to deceive or to defraud the underwriter. *Aliud est celare, aliud tacere.*" There is no principle which requires the assured to use all accessible means of acquiring information, material to the risk, *up to the last instant of time;* and, therefore, the omission of the assured to call at the post-office, where a letter was received on the morning of the day the insurance was effected, containing material information, did not vitiate the policy.[4] But when an underwriter *inquires* as to the condition of the property proposed to be insured, its situation, &c., the applicant must, at his peril, give a fair and full answer.[5]

§ 177. As has been already stated, in cases of insurance against *marine* risks, it has been considered that the assured is bound, although no inquiry be made, to disclose every fact within his knowledge which is material to the risk, and that this doctrine is not applicable, in its full extent, to fire

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1 The celebrated judgment of Lord Mansfield, in Carter *v.* Boehm, 3 Burr R. 1408; 1 Arn. on Ins. 565 ;Ellis on Fire and Life Ins. 38; 3 Kent Comm. 354; and see Vallance *v.* Dewar, 1 Campb. R. 503, and the cases there cited; and Clark *v.* Manuf. Ins. Co. 8 How. (U. S.) R. 235.

2 2 Duer on Ins. 569.

3 Fletcher *v.* Commonwealth Ins. Co. 18 Pick. (Mass.) R. 419.

4 Neptune Ins. Co. *v.* Robinson, 11 G. & Johns. (Md.) R. 256.

5 Gates *v.* Madison Mutual Ins. Co. 3 Barb. (N. Y.) Sup. Co. R. 73, 2 Comst. (N. Y.) R. 43; Frost *v.* Saratoga Mutual Ins. Co. 5 Denio, (N. Y.) R. 154.

policies; but yet, when the applicant for fire insurance is *explicitly called on* for information, he is equally bound to make a true and full representation concerning all the matters brought to his notice; and any concealment would have the same effect as in the case of a marine risk.[1] In Burritt *v.* Saratoga County Mutual Fire Insurance Company,[2] just referred to, the court considered it to be a case in which the materiality was not open to discussion; and the court in that case say, — "The plaintiff was required by the conditions annexed to the policy, and by the printed form of application, which he used, to give the information which he withheld; and it was one of the conditions of insurance, 'that if he should make *any* misrepresentation or *concealment* in the application, the policy should be void and of no effect.' Nothing is said about fraud; but *any* concealment in the application avoids the policy." This doctrine was applied in a case in which the plaintiff was directly called upon to state the relative situation of the building insured as to "all other buildings within the distance of *ten rods*," and that *any misrepresentation or concealment would avoid the policy.* The applicant omitted to state several buildings which stood within that distance, and among the number, one far more hazardous than that to which the policy applied. It was held, that the omission, however innocent, was fatal to the policy, whether material or immaterial to the risk. The call of the insurers, in this case, upon the assured, was direct, clear, and specific, requiring him to state the relative situation of his tenement; and the answer to the call was a concealment and suppression of the fact, by the applicant, of the existence of a barn within that prescribed distance, which must have been known to him. On these grounds, it was held in another

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[1] See *ante*, § 151, 174.

[2] Burritt *v.* Saratoga County Mutual Ins. Co. 5 Hill, (N. Y.) 188; and see Delonguemare *v.* Tradesmens Ins. Co. 2 Hall, (N. Y.) R. 589.

[3] Burritt *v.* Saratoga County Mutual Ins. Co. 5 Hill, (N. Y.) R. on p. 193, Bronson, J.; and see Am. Lead. Ca. 458.

case, that where the conditions, which were made a part of the policy, declared that all applications for insurance must be in writing, and must state the relative situation of the property as to other buildings, and *the distance from each, if less than ten rods;* and the printed application was so filled up as not to show the distance of other buildings from the insured property, though there was one within *ten rods*, it was held that the assured could not recover.[1]

§ 178. But where an application for an insurance, referred to in the policy as forming part thereof, the marginal inquiry in relation to the premises was in these words: "*How bounded*, and *distance from other buildings, if less than ten rods*," and the answer states the *nearest* building on the several sides of the insured premises, but does not state all the buildings within ten rods; it was held, that such an answer was not a warranty that there were no other buildings within that distance than those mentioned. It is the feature of this case which distinguished it from the two immediately preceding, (the decisions in which are right,) that the inquiry was widely different. It simply required a statement of the distance (of the tenements) from other buildings, "if less than *ten rods;*" not calling for the distance from *all or from each* of the buildings within the ten rods, but grouping them together, and asking for the distance from other buildings collectively. "When," said Mr. Justice Jones, "the insurers inquired of the plaintiffs in error, what the distance was of the tenements offered for insurance, from other buildings, if less than ten rods, would not, or might not, the plaintiffs understand that the information sought of them was, *how near* the buildings in each direction approached to them? That these assured did understand the call in that light is obvious. The answer shows it. And that answer is an apt response, and makes a full communication of the information asked for in that sense

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[1] Jennings *v.* Chenango County Mutual Ins. Co. 2 Denio, (N. Y.) R. 75.

of the call. The statement was intelligible and clear. It stated the distance of their tenements from the buildings *nearest* thereto in every direction. The very term, *nearest*, used by them, implied that there were or might be other buildings more remote, but within the range of twelve rods. The insurers were satisfied with the communication, and accepted it as sufficient. If the object and intention of their inquiry and call for information had been a full statement and communication to them of all the buildings within the ten rod circuit, and the distance of the applicant's from each of them, would they not have called for an explanation, and further answer, as they must have seen that the *nearest* buildings were given, and that these were not stated to be the whole." [1] The opinion of Judge Jones was unanimously concurred in by the whole court, and has been held by the court to be law, in Masters *v.* Madison County Mutual Insurance Company.[2]

§ 179. If the conditions, which are made a *part of the policy*, declare that all applications for insurance must be in writing, and must state the relative situation of the property as to other buildings, and the distance from each, if less than a certain specified distance, and the printed application is so filled up as not to show the distance of other buildings from the insured property, though there is one within the distance specified, the assured cannot recover.[3] The conditions annexed to a policy issued by a mutual insurance company, after providing that all applications for insurance should be in writing, according to the printed forms prepared by the company, further provided, that the application should state the relative

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[1] Gates *v.* Madison Mutual Ins. Co. 2 Comst. (N. Y.) R. 43, overruling the decision in 3 Barb. Sup. Co. R. 73.

[2] Masters *v.* Madison County Mutual Ins. Co. 11 Barb. (N. Y.) Sup. Co. R. 624, overruling the case of Gates *v.* The same defendants, 3 Barb. (N. Y.) Sup. Co. R. 73; and see Kennedy *v.* St. Lawrence County Mutual Ins. Co. 10 Barb. Sup. Co. R. 285.

[3] Jennings *v.* Chenango County Mutual Ins. Co. 2 Denio, (N. Y.) R. 75.

situation of the building insured in respect to all other buildings standing *within ten rods*, and that any misrepresentation or concealment should avoid the policy. The printed form of application prepared by the company, and used by the assured, contained a note in the margin, thus, — "*Relative situation as to other buildings, distance from each other less than ten rods;*" and in the blank opposite to this, the assured inserted a description of five buildings which stood within the distance specified, but omitted to mention several others standing within the same distance. It was held, that the omission, however innocent, was fatal to the policy; and this, whether material to the risk or not. It was no answer for the assured to say, that the error or suppression was the result of accident, forgetfulness, or inadvertence. It is enough, that the insurer has been misled, and been induced to enter into a contract, which, upon full information, he would either have declined, or would have made on different terms.[1]

§ 180. If the defence is, that the application does not mention all the buildings standing within a certain number of rods of the building insured, agreeably to a condition to that effect annexed to the policy, the condition will be considered to relate exclusively to insurance upon *buildings*, and, therefore, to furnish no grounds of defence to the plaintiff's claim respecting the *personal property*, covered by the policy; it would be absurd and unintelligible when applied to personal property.[2] Where, in the application for insurance on personal property, which application was annexed to the policy issued, and was referred to therein, and made a part thereof, opposite to the usual printed inquiries "where situated, and relative situation as to other buildings, distance from each if less than ten rods," was written a description of several buildings standing within ten rods of the one in which the

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1 Burritt *v.* Saratoga County Mutual Fire Ins. Co. 5 Hill, (N. Y.) R. 188.

2 French *v.* Chenango County Mutual Ins. Co. 7 Hill, (N. Y.) R. 122.

goods insured were, but several other buildings within that distance were not mentioned; it was held, that had this been an insurance on buildings, the statement, in the application, as to distance from the other buildings, would have been a warranty; and that if a different rule prevails in respect to personal property, in any case, such rule cannot apply where personal property only is mentioned.[1]

§ 181. By the Supreme Court of Pennsylvania, it was held, that where the constitution and by-laws of a mutual fire insurance company do not require from an applicant for insurance a statement as to the condition of the property designed to be insured; but where the by-laws provide for a survey at the instance of the company, the policy is not void by reason of omission on the part of the assured, to state a fact material to the risk, where no inquiry is made of him on the subject.[2]

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[1] Sexton *v.* Montgomery County Mutual Ins. Co. 9 Barb. (N. Y.) Sup. Co. R. 191; and see Stebbins *v.* Globe Ins. Co. 2 Hall, (N. Y.) R. 632.

[2] Satterthwaite *v.* Mutual Beneficial Institution, 2 Harris, (Penn.) R. 393. In this case the court say, — "The mere omission by the plaintiffs, when they made their application to insure grain in the mill, to return the corn-kiln, or to say any thing about it, when it is well known that there are corn-kilns attached to half or more of the grist and merchant mills, would not excuse the officers of the company, who neglected inquiry, from gross negligence. No men of common prudence would grant a policy on the grain in a grist or merchant mill, without inquiring into its situation, and the situation of the adjacent buildings. As regards this mutual insurance company, under the rules and regulations, the evidence would have been irrelevant." That the governing principle and object of mutual insurance companies is to share each other's losses for the general weal, the court, in this case, cite Susquehanna Ins. Co. *v.* Perrine, 7 Watts & S. (Penn.) R. 348, and Rhinehart *v.* Alleghany Mutual Ins. Co. 1 Barr, (Penn.) R. 359. See, as to mutual insurance companies, *ante*, § 10, p. 45, and § 146, p. 176.

CHAPTER VIII.

MISREPRESENTATION AND CONCEALMENT OF THE INTEREST OF THE ASSURED.

§ 182. We have already shown it to be abundantly well settled, that an insurance effected against loss by fire, will entitle the assured, in case of loss, to recover upon the proof of *any* interest in the subject-matter insured, however indirect; and it has likewise been made to appear, that it is in general sufficient if the subject-matter of the insurance, and the nature of the risk are set forth in the policy, without any representation of the nature or character of the interest for which the insurance is intended as a protection.[1] The usual mode of application for insurance upon a building specified, (unless to a mutual insurance company,) is without any statement of the nature or extent of the applicant's interest.[2]

§ 183. An assured, in his application for insurance on a house against fire, stated it to be his own property; but no inquiry was made by the insurers as to the state of his title; and although the house had been mortgaged, and the equity of redemption had been seized on execution, it was held, that these circumstances were not material to the risk, and that the statement in the application was not material to the risk. Judge Wilde, in giving the judgment of the court,

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[1] See *ante*, Chap. IV.

[2] Niblo *v.* North American Fire Ins. Co. 1 Sand. (N. Y.) Sup. Co. R. 551; Catron *v.* Tennessee Ins. Co. 6 Humph. (Tenn.) R. 177; 1 Phill. on Ins. 354, 3d ed.; Brown *v.* Williams, 15 Shep. (Me.) R. 252; Smith *v.* Bowditch, 6 Cush. (Mass.) R. 448.

said, — "The principal objection on which the defendant's counsel rely, is that the plaintiff did not make a full and fair disclosure of his interest, and that there was such a concealment as vitiated the policy. Undoubtedly, the plaintiff was bound to make a full and true exposition of all the facts and circumstances relating to the condition, situation, and value of the property insured, and to *disclose his interest therein* so far as was material to the risk. But we do not perceive how the encumbrances on the plaintiff's property could be considered as material to the risk. The destruction of the house did not extinguish the mortgage debts, so that he was interested to the full amount of the value of the property insured. *It was not necessary to specify in the policy that the property was under mortgage.*" [1]

§ 184. In Fletcher *v.* Commonwealth Insurance Company,[2] the action was brought on a policy of insurance effected by the plaintiff for a certain amount on his store, and a certain amount of his stock in trade, contained in his store. One B. owned the land on which the store had been placed, and he had agreed that the plaintiff might move the store on to the land and keep it there, paying an annual rent for five years, unless B. should request him to remove it, in which case he should have six months' notice; and there was no writing between him and the plaintiff in relation to the store or the land. Upon this evidence, it was contended, that facts *material to the risk* had been *suppressed*, and that thereby, the policy was rendered void. The court, in giving judgment, said, — "Now the evidence is, that the plaintiff did not say whether he owned the land or not; and it is not in our power to see how that varied the risk which the defendants insured against fire. It would have been just as material to have stated on

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[1] Strong *v.* Manufacturers Ins. Co. 10 Pick. (Mass.) R. 40, and cited *ante*.

[2] Fletcher *v.* Commonwealth Ins. Co. 18 Pick. (Mass.) R. 419.

which side, east or west, of the street, the house stood; whether it were painted or not." The court, furthermore said, — "that enough was truly represented to put the defendants upon their inquiries for more." [1]

§ 185. It has been well settled, in the State of New York, both as regards marine insurances and insurances against fire, that the nature or amount of the interest, held by the assured in the property at risk, need not be communicated to the insurer. The subject came before the Supreme Court of that State in the case of Tyler *v.* The Etna Fire Insurance Company. The insurance had been effected by a party in possession of the premises, as vendees under articles of agreement, on which a considerable portion of the purchase-money was unpaid; and it appeared that, in applying to the defendants, he had held himself out as owner of the premises, without disclosing the real nature of his title. This was relied on at the trial as being a material misrepresentation, and one which, therefore, avoided the policy. But the court held otherwise.[2]

§ 186. But a different view has been taken of this subject by the Supreme Court of the United States, who have held, that although a special or limited interest in the property insured will be covered by general words of insurance,[3] yet that a full representation must be made of the actual circumstances of the case, and of the relation which the assured really holds to the premises.[4] To the same effect is Carpenter

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[1] Fletcher *v.* Commonwealth Ins. Co. 18 Pick. (Mass.) R. 419; and see *ante*, § 152, *et seq.*, as to materiality of concealment.

[2] Tyler *v.* Etna Fire Ins. Co. 12 Wend. (N. Y.) R. 507, and 16 Wend. R. 385; and Niblo *v.* North American Fire Ins. Co. 1 Sand. (N. Y.) Sup. Co. R. 551.

[3] See 2 Am. Lead. Cases, and *ante*, Chap. IV.

[4] Columbian Ins. Co. *v.* Lawrence, 2 Peters, (U. S.) R. 25. The material question in this case was, — did the offer for insurance state the interest

v. Providence Washington Insurance Company.[1] But these decisions have been regarded as being opposed to the predominating weight of authority.[2]

§ 187. It is clearly well settled, as stated by Mr. Phillips,[3]

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of the assured in the property to be insured? The offer described the property as *belonging* to L. & P.; and stated it, afterwards, *their* stone mill; without any qualifying terms which would lead the mind to suspect that their title was complete and absolute. The insurers were made to believe that the interest of the assured was of this character. But instead of such an estate in the property as the representation justified the insurers in expecting, the evidence disclosed, that the assured had only one half of one third, under a lease for three lives, renewable forever, and one half of the other two thirds as mortgagees; that the other moiety was held under a contract, the terms of which had not been complied with; and which, if complied with, would give them a title to two thirds of that moiety only as mortgagees. The court were of opinion, that so precarious a title, depending for its continuance on events which might, or might not, happen, was not such a title as was described in the offer.

[1] Carpenter *v.* Providence Washington Ins. Co. 16 Peters, (U. S.) R. 470, 495. The same general ground was taken in the case of Howell *v.* Cincinnati Ins. Co. 7 Ohio R. 286, 2 Am. Lead. Cases, 457.

[2] 1 Phill. on Ins. 3d ed. 355, and 2 Am. Lead. Cases, *ub. sup.* The learned and laborious authors of this work, after an elaborate review of the authorities, arrive at the conclusion, that, — "since under the course of business in this country and in England, which must be taken as conclusive on the question of practical convenience, insurance is effected by a general designation of the property insured, and the averment and proof of interest are confined to the declaration and evidence, there can be little substantial ground for enforcing on the insured a minuteness of statement as to the real nature of his relation to the property, which is wholly at variance with the generality of the contract. The description contained in the policy, of the nature of the risk, is sufficient to limit the liability of the insurer, to making compensation for such injuries as may affect the subject-matter insured. The precise interest of the assured, or the manner in which he is affected, by the happening of the contingencies provided against in the policy, can only come in question for the purpose of establishing the right of recovery after the loss has happened."

[3] 1 Phill. on Ins. (3d. ed.) 354; and see *ante*, Ch. VI. § 152, and Ch. VII.

that if the title *is inquired about*, a substantially correct statement of it must be made, or the policy will be void.[1] This is on the ground, that an inquiry will make a fact material which otherwise would not be so; the applicant for insurance will be answerable, if, upon inquiry as to interest, he omits fairly to disclose, or represents without substantial accuracy. The court, in giving judgment in the case of Strong *v.* Manufacturers Insurance Company,[2] say, — "If, in the opinion of the underwriters, it was important and material to the risk, to ascertain the nature of the interest intended to be protected by the policy, it must be presumed that they would have inserted, in the form of the application, an interrogatory, so as to elicit the proper information. There being no such interrogatory, and no such information being required in any case as to similar risks, the plaintiff had every reason to infer, that the state of his title was not deemed material to the risk, and was not required by the underwriters to be ascertained."[3] So that if such a representation of title were necessary in a marine risk, it would be deemed as dispensed with, by the underwriters, under the circumstances." The assured, unless inquired of, need not state that his interest is an undivided moiety belonging to his wife, in which he has a life-interest.[4]

Locke *v.* North American Ins. Co. 13 Mass. R. 97. See Higginson *v.* Dale, Ibid. 96.

[1] Ibid., and Niblo *v.* North American Fire Ins. Co. 1 Sand. (N. Y.) Sup. Co. R. 551.

[2] Strong *v.* Manufacturers Ins. Co. 10 Pick. (Mass.) R. 44.

[3] In this case the assured, in his application for insurance on a house, stated it to be his own property; but no inquiry was made by the underwriters as to the state of his title. The house in fact had been mortgaged, and the equity of redemption had been seized on execution; and it was held by the court, that these circumstances were not material to the risk, and that the statement in the application was not a misrepresentation. See *ante*, § 58, p. 100; and see Fletcher *v.* Commonwealth Ins. Co. 18 Pick. (Mass.) R. 419, and cited *ante*.

[4] Delathy *v.* Memphis Ins. Co. 8 Humph. (Tenn.) R. 624; Franklin Ins. Co. *v.* Drake, cited *ante*, § 64.

In marine insurance, *circumstances* affecting the seaworthiness of the ship, need not be disclosed in the first instance by the assured, but he must make a true representation of facts *in reply* to the *inquiries* of the insurer.[1]

§ 188. Where a mutual fire insurance company are entitled to a *lien* on all property insured by them, and where one of the conditions is, that if the representations made by the applicant for insurance, is materially false, the policy should not cover the loss; it will operate as a fraud upon the members of the company, if the applicant calls the property proposed to be insured his own, and *thereupon* obtains an insurance of it. The misrepresentation is materially untrue, inasmuch as each member of the company is interested in having such a security, from every other member, as will insure the payment of his proportion of any losses occurring during their mutual membership; for if an assessment of one should fail to be collected, it must be assessed upon the others.[2] In Egan *v.* Mutual Insurance Company,[3] the defendants, on the trial, offered to prove that several judgments were rendered against the assured after the making of the policy, and before the fire, and which became liens on the house which was burned; the application above referred to, declaring, that if the assured should suffer a judgment which should be a lien

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[1] 1 Phill. on Ins. 323. See *ante*, § 144.

[2] So expressly held in Brown *v.* Williams, 15 Shep. (Me.) R. 252; and see Masters *v.* Madison County Mutual Ins. Co. 11 Barb. (N. Y.) Sup. Co. R. 624; Houghton *v.* Manufacturers Mutual Fire Ins. Co. 8 Met. (Mass.) R. 114. In Kentucky, the Louisville Insurance Company, under their charter, may insure estate held by fee-simple title, or any less estate, but the nature and extent of the estate of the interest insured is explicitly declared by the charter, must be set forth fully and fairly in the policy, together with every encumbrance calculated to affect that interest; otherwise the policy to be invalid. Addison *v.* Louisville Ins. Co. 7 B. Mon. (Ken.) R. 470. As to mutual insurance companies, see *ante*, § 10, p. 45, and § 146, 181.

[3] Egan *v.* Mutual Ins. Co. 5 Denio, (N. Y.) R. 326.

on the insured premises, without communicating to the insurers, the policy should be void. It was held, that the policy was an express warranty, and the contract having been broken the policy was held to be void.

§ 189. In the case of Smith *v.* Bowditch Mutual Fire Insurance Company, in Massachusetts,[1] the defect in the plaintiff's claim was this: At the time of the insurance, the assured had no legal title to the property described in the policy. He had formerly owned and mortgaged it; but the mortgage had been foreclosed, and he had only a bond for reconveyance of it on certain conditions. The policy having been made, in terms, subject to the provisions and conditions of the charter and by-laws of the company, it was held, that it legally adopted and embodied those provisions and conditions, as a part of the contract, to the same effect as if they had been set forth at large in the policy. It was argued, in behalf of the plaintiff, that the person having an insurable interest may represent the property as his own, and is not bound to state that his interest is a qualified one,[2] unless inquiries are made on the subject. By Metcalf, J., — "The present defendants are a mutual insurance company, entitled by law to a lien on the buildings insured by them, and the land under the same; and in the case at bar they relied on that lien as their policy expressly avers. In the case of Brown *v.* Williams,[3] the principles, on which we decide this case, were distinctly recognized and affirmed. The assured, in that case, applied to a mutual insurance company, and stated, in his application for insurance, and in answer to the question, 'Who is the owner of the building?' that *he* was the owner. In fact, he was not the owner of the building, but had, like the assured in this case, a bond for a conveyance thereof to him, on his performing certain conditions. Whitman, C. J., said, — "It is true that an equitable

1 Smith *v.* Bowditch Mutual Fire Ins. Co. 6 Cush. (Mass.) R. 448.

2 See *ante*, Chap. IV.

3 Brown *v.* Williams, 15 Shep. (Me.) R. 252; and see *ante*, § 188.

interest may be the subject of an insurance; and, in policies obtained at the common offices for the purpose, it need not be described as such. But at mutual insurance offices, it must necessarily be otherwise, when a lien in behalf of all concerned is to be created. It then becomes material that the company should be apprised of the true state of the ownership of the property insured. It will operate as a *fraud* upon the members of the company, if the applicant calls the property, proposed to be insured, *his*, and thereupon obtains insurance, when in fact he has but a contingent interest in it." In Mahon *v.* Mutual Assurance Company, in Virginia,[1] the plaintiff filed a bill in chancery, stating, that he leased an unimproved lot of land in Norfolk for ten years, and was to be at liberty to remove the houses he might erect on it; that kind of lease being usual in Norfolk. The plaintiff had built upon the premises, and insured the buildings in the office of the aforesaid company, which were afterwards accidentally burnt. The answer to the bill, praying for a decree for payment of the sum insured, admitted that the buildings were insured, but denied *notice of the lease;* and insisted, that no other than fee-simple tenements were insurable in their office. The court, in delivering their resolution, said, — "That the appellee having only a temporary estate, and interest for a term of years in the land whereon the house insured by him stood, and *not having disclosed his true title and real interest in the said land, fully and fairly*, in the declaration he made of it to the appellants, at the time they insured the said house, as he ought to have done, his case comes within the rule respecting concealment or misrepresentation; and, whether done by design or mistake, renders his contract with the insurers null and void; especially as by the constitution, rules and regulations of the society, formed by the insurers in this case, the assurance was mutual, and the assured bound to pay a share, according to the sum insured, of all losses sustained by any

[1] Mahon *v.* Mutual Assur. Co. 5 Call, (Va.) R. 517.

of the insurers and partners in the insurance company; and the property of each person so insured, being bound for such payment, ought to be as permanent as the property of the others to answer such losses; or, if not so permanent, at least, should be known to the company before insurance thereof made." [1]

§ 190. As to the dependence of the liability upon the statute creating a mutual insurance company, and its by-laws, there is the case of Holmes *v.* Charlestown Mutual Fire Insurance Company, in Massachusetts.[2] In this case, there was an application against loss of a meeting-house and its fixtures, to a mutual fire insurance company, that could not by statute and its own by-laws, insure upon any building an amount exceeding three fourths of the value thereof; and in the application the value of the building was stated to be $4,000. The company executed a policy, insuring under the limitations expressed in its own by-laws, and in the statute regulating mutual fire insurance companies, $3,500 on the meeting-house and fixtures. The house having been destroyed by fire, the company paid to the assured $3,000 towards the loss. Then in a suit on the policy to recover the balance of $500, it was held, that the statement of the value of the house and fixtures, in the application for insurance, was conclusive on the assured, so that they could not be permitted to show that the property insured, at the time of the insurance, was of such a value that $3,500 did not exceed three fourths thereof. The court said, — "on referring to the application,

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[1] But, said the court, — "As no fraud appears to have been contemplated by him (the assured,) and the insurance might have been made and done through the mistake or misapprehension of *both parties*, this court is of opinion that all money paid or advanced by the appellee to the appellants, or their agents, for premiums and quotas on account of his insuring the said house, should be repaid to him with interest, and that the parties ought to bear their own costs."

[2] Holmes *v.* Charlestown Mutual Fire Ins. Co. 10 Met. (Mass.) R. 211.

the value of the building is agreed to be four thousand dollars; and the plaintiffs now ask liberty to show that it was, in fact, worth a much larger sum, at the time of the insurance. But such evidence is inadmissible, and the valuation, if made in good faith, is binding on both parties. The converse of this proposition has arisen in two cases upon fire policies, and in them it is distinctly settled that the companies were concluded on the question of over-valuation, the same not being fraudulent.[1] If the underwriters are precluded from going into evidence to show an over-valuation, when no fraud is alleged, owners must in like manner be concluded, when the property is undervalued."

§ 191. The surveyor and agent of an insurance company, on being applied to for an insurance on the plaintiff's mill, went to see the property, and made a survey thereof, the plaintiff not accompanying him. The agent then made out the application for the plaintiff to sign; using the printed blank furnished to agents for that purpose; and he was informed at the time, by the plaintiff's son, that there was a

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[1] Borden *v.* Hingham Mutual Fire Ins. Co. 18 Pick. (Mass.) R. 523; Fuller *v.* Boston Mutual Fire Ins. Co. 4 Met. (Mass.) R. 206. If a building is insured by a mutual insurance office to an amount on a representation made in regard to its value, by the assured, and with the knowledge or the means of knowledge, of the situation and actual value of the property, and the assured pays a premium, and assumes liabilities as a member of the company, proportioned to the amount insured, then, in the absence of fraud, the company will be liable for the whole of such amount, although it exceeds the value of the interest of the assured. If it were not so, the assured would not get the security by the policy for which he paid, against the risk of fire; and the insurance company would get an amount of premium and deposit, and a right or claim for contribution against the assured, who became a member of the company, greatly beyond what they are entitled to have. The assured makes, and the company accepts, the estimate, and it is not to be supposed that the parties intended that the value of the building insured should thereafterwards be drawn into question. Borden *v.* Hingham Fire Ins. Co. 18 Pick. (Mass.) R. 523, *ub. sup.*

mortgage on the premises, which was a lien thereon. As the application made no mention of any encumbrance, it was held that the notice, given to the agent, of the prior encumbrance, was sufficient notice to the company; and that the omission to set forth the mortgage in the application, was not a concealment affecting the risk; notwithstanding the application, by a memorandum in the margin, required the applicant to state whether the property was encumbered, by what, and to what amount, and if not, to say so; and although the by-laws of the company made the person taking the survey the agent of the applicant. Positive notice was given to the agent of the company, and that was sufficient.[1]

§ 192. In Davenport *v.* The New England Mutual Fire Insurance Company, in Massachusetts, it appeared that the company was established by the laws of New Hampshire, and that they insured a building of the plaintiff's in New Bedford, in Massachusetts, and that the building was destroyed by fire. Also, at the time the insurance was made, the estate was encumbered by two mortgages, upon which large sums of money were due. In the printed application, signed by the plaintiff, there was this question distinctly put to him, to wit, — "Is the property encumbered?" to which the plaintiff gave a written answer in the negative. The company insisted, that the policy was void, on account of this misrepresentation, and the plaintiff contended that this misrepresentation was immaterial, because the company was a corporation created by the laws of the State of New Hampshire, and, therefore, would have no lien by the statute of the Commonwealth of Massachusetts; and that a law of New Hampshire would not operate in Massachusetts, to give the company a lien, if

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1 Masters *v.* Madison County Mutual Ins. Co. 11 Barb. (N. Y.) Sup. Co. R. 624.

2 Davenport *v.* New England Mutual Fire Ins. Co. 6 Cush. (Mass.) R. 340.

there were any such law there. By Fletcher, J., in giving the judgment of the court, — "Irrespective of the lien, whether the defendant would or would not have one, the misrepresentation was clearly a material misrepresentation. It was material for the insurers to know of the encumbrances, in reference to the responsibility of the insured, and his ability to meet his engagements to the company; it was material to know who was interested in, or had any title to, the estate; but more particularly and especially was it material, for the defendants to know what interest the plaintiff himself had in the premises, and whether his estate was encumbered or unencumbered. It is manifest, that the defendants deemed this information material; and they put the direct question, and it was a proper and a practical question; and it was material that the plaintiff should answer it truly. The plaintiff, having given an untrue answer, (whether by accident, mistake, or design,) it matters not, to a direct, plain, and practical question, cannot now be heard to say it was immaterial."

CHAPTER IX.

ALIENATION OF THE PROPERTY INSURED AND ASSIGNMENT OF THE POLICY.

§ 193. In a preceding chapter,[1] it has been shown, that an insurance against fire, without an interest, is a wagering contract, and therefore, void. It is requisite, likewise, that the assured, though he had an interest at the time of the insurance, should have an interest in the subject insured *at the time of the loss;* because policies against fire are personal contracts *with the assured;* and they do not pass to an assignee or purchaser of the property insured, unless by the consent of the underwriters. This was resolved to be the doctrine in the two ancient cases before cited,[2] of Lynch *v.* Dalzell,[3] and Sadlers Company *v.* Badcock;[4] and it has ever since been considered that, upon common-law principles, and by judicial decisions, the policy should not be obligatory any longer than the property insured continues in the individual named in the policy, as the owner.[5] So that if the assured sells the property, and parts with all his interest therein before the loss happens, there is an end of the policy, unless it is assigned to the purchaser, with the assent of the insurer; or, if he retains but a partial interest in the property, it will only

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1 *Ante*, Chap. IV.

2 *Ante*, Introd. § 1 – 37; and Chap. II.

3 3 Brown, P. Ca. 497.

4 Sadlers Co. *v.* Badcock, 2 Atk. R. 554.

5 Lane *v.* Maine Mutual Fire Ins. Co. 3 Fairf. (Me.) R. 44.

protect such insurable interest as he had in the property at the time of the loss.[1]

§ 194. The construction under consideration is thus, in a very lucid manner, stated by Mr. Ch. J. Shaw: — "An insurance of buildings against loss by fire, although in popular language it may be called an insurance of the estate, is in effect a contract of indemnity, with an owner, or other person having an interest in the preservation of the buildings as mortgagee, tenant, or otherwise,[2] to indemnify him against any loss which he may sustain in case they are destroyed or damaged by fire. If, therefore, the assured has wholly parted with his interests before they are burnt, and they are afterwards burnt, the underwriter incurs no obligation to pay any body. The contract was to indemnify the assured; if he has sustained no damage, the contract is not broken. If, indeed, on a transfer of the estate, the vendor assigns his policy to the purchaser, and this is made known to the insurer, and is assented to by him, it continues a new and original promise to the assignee, to indemnify him in like manner, whilst he retains an interest in the estate; and the exemption of the insurer from further liability to the vendor, and the premium already paid for insurance for a term not yet expired, are a good con-

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[1] Etna Fire Ins. Co. *v.* Tyler, 16 Wend. (N. Y.) R. 385; Jessel *v.* Williamsburg Ins. Co. 3 Hill, (N. Y.) R. 88; Murdock *v.* Chenango County Mutual Ins. Co. 2 Comst. (N. Y.) R. 210; Tillou *v.* Kingston Mutual Ins. Co. 7 Barb. (N. Y.) R. 570; Clark *v.* Mutual Fire Ins. Co. 6 Cush. (Mass.) R. 342; Felton *v.* Brooks, 4 Cush. (Mass.) R. 203; Abbott *v.* Hampden Mutual Fire Ins. Co. 17 Shep. (Me.) R. 414; McMasters *v.* Westchester County Mutual Ins. Co. 25 Wend. (N. Y.) R. 379; Adams *v.* Rockingham Mutual Fire Ins. Co. 17 Shep. (Me.) R. 492; Sherman *v.* Fair, 2 Speer, (S. C.) R. 547; Howard *v.* Albany Ins. Co. 3 Denio, (N. Y.) 301; Bodie *v.* Chenango County Mutual Ins. Co. 2 Comst. (N. Y.) R. 53; McCulloch *v.* Indiana Mutual Ins. Co. 8 Blackf. (Ind.) R. 50; Sullivan *v.* Massachusetts Ins. Co. 2 Mass. R. 318; Dadman *v.* Worcester Mutual Fire Ins. Co. 11 Met. (Mass.) R. 429.

[2] See *ante*, Chap. IV. as to what is an interest.

sideration for such promise, and constitute a new and valid contract between the insurer and the assignee."[1]

§ 195. The question then is presented, what is an alienation, or a transfer, sufficient to defeat a recovery in an action upon the policy. According to Blackstone, the most usual method of acquiring title to real estate is that of "alienation;"[2] and according to Cruise, it is a mode of obtaining an estate by purchase, by which it is yielded up by one person and accepted by another.[3] But every transfer or assignment of interest in real property is not such as will release the insurer from his obligation. The term *alienate*, say the Supreme Court of New York, "has a technical legal meaning, and any transfer of real estate, *short of the conveyance of the title*, is not an alienation of the estate; no matter in what form the sale may be made, unless the title is conveyed to the purchaser, the estate is not alienated."[4]

§ 196. As has been intimated,[5] the alienation of one of several estates, separately insured by the same policy, in which it is provided, that when any property insured shall be alienated, the policy shall become void, only avoids the policy as to the interest so alienated. Thus, where a tavern house, and shop were insured in the same policy, but valued separately, the alienation of one, it was held, would in no degree affect the insurance on the other. The alienation

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1 Wilson *v.* Hill, 3 Met. (Mass.) R. 66; Per Shaw, C. J., who cites Carroll *v.* Marine Ins. Co. 8 Mass. R. 515; and see Granger *v.* Howard Ins. Co. 5 Wend. (N. Y.) R. 200. That the contract with the assured is of a personal nature, see *ante*, Intr. § 1 *et seq.*, and Chap. II. of the Treatise; and that is now everywhere so treated; and as a contract of indemnity, see 2 Am. Lead. Ca. 464.

2 2 Bla. Comm. 287.

3 Cruise, Dig. tit. 32, ch. 1, § 1.

4 Masters *v.* Madison County Mutual Ins. Co. 11 Barb. (N. Y.) Sup. Co. R. 224.

5 See *ante*, § 193.

of the shop would no doubt avoid the policy *pro tanto*, and only *pro tanto;* each of the buildings, being insured separately the alienation of one would no more affect the insurance on the other, than if they had been insured in separate policies. If the assured retain but a partial interest in either, the shop or in the tavern, the policy will protect such interest.[1]

§ 197. When several owners of property are jointly insured, a sale by one of the owners of his interest in the premises, to the other owners, is not such an alienation of the property as will avoid the policy, even under an express provision in the act under which the insurance company was incorporated, declaring that when any property is insured with such company, "shall be alienated by sale or otherwise, the policy shall become void." Yet if the assignor had conveyed his interest to a stranger, the policy would cease to operate as to that share at least.[2] In the case just referred to the court say, — "It was not, strictly speaking, an *alienation*, i. e. a transfer from one to another; it was a change of interests among joint-owners; no stranger is introduced; no addition to the number of the assured is made. One copartner retires from the concern, and sells out his interest to the others. The company, therefore, run no risk of having careless or improvident persons substituted in the place of the original parties with whom they dealt, to guard against which was the principal object of the statute."

§ 198. It seems indeed perfectly clear, and by adjudged cases well settled, that where the property insured is held by two persons jointly, or as tenants in common, a conveyance of the share from one to the other, while it takes the interest

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[1] Clark *v.* New England Fire Ins. Co. 6 Cush. (Mass.) R. 342; Etna Fire Ins. Co. *v.* Tyler, 16 Wend. (N. Y.) R. 385.

[2] Tillou *v.* Kingston Mutual Ins. Co. 7 Barb. (N. Y.) Sup. Co. R. 570.

thus conveyed out of the protection of the insurance which had been previously effected in the name of both, would not prevent a recovery for the share not conveyed.[1] Such was the view expressly taken by Bronson, J., in the case of Howard *v.* Albany Insurance Company;[2] but in that case the majority of the court went farther, and so far as to decide, that an assignment of one of the two tenants in common to the other was a complete bar to a joint action brought on a policy of insurance in the names of both; and this decision was subsequently approved and followed by the Court of Appeals of New York, in the case of Murdock *v.* Chenango County Mutual Insurance Company.[3] The doctrine that the interest of the assured must be retained was most strictly carried out in Cockerill *v.* Cincinnati Mutual Insurance Company,[4] in which it was held, that the effect of a conveyance, in terminating all insurable interest, survived a repurchase of the interest before the loss. The insurance was on a steamboat, and the court, in giving judgment, say, — "The repurchase of the boat by the assured would not reinstate the policy; it required some further act to be done. If the determination of the interest of the assured was a forfeiture merely of the policy, that could only be waived by a written instrument to that effect. If this was not a forfeiture which could be waived, but an entire destruction of the policy, the agreement was equivalent to a new policy and should have been in writing." [5]

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[1] 2 Am. Lead. Ca. 462.

[2] Howard *v.* Albany Ins. Co. 3 Denio, (N. Y.) R. 301.

[3] Murdock *v.* Chenango County Mutual Ins. Co. 2 Comst. (N. Y.) R. 210. In general, the action on a contract must be brought in the name of the party in whom the *legal* interest, in such contract, is vested. 1 Chitt. Pl. 3.

[4] Cockerill *v.* Mutual Ins. Co. 16 Ohio R. 148.

[5] This decision has thus been commented on: — "This course of decision obviously tends to deprive the assured of that substantial indemnity against actual loss, which is the great object of the contract of insurance, and it might not be followed unless dictated by necessity. When the property

§ 199. It is a peculiarity incidental to the contract of insurance against fire, that it is not assignable except with the consent of the insurer;[1] in marine insurance, if there be an assignment of the policy, accompanied with a transfer of the interest, although without the assent of the underwriter, the contract is kept alive for the benefit of the assignee.[2] In marine policies the contract is more specifically applicable to the property insured, rather than to the owner of it; in fire policies the contract is not one which runs with the land.[3]

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and the person are within the terms of the policy, at the time of its execution, and at the time of the loss, it ought not to lose its effect because they may have been in a different position during the intermediate period. There are many instances in which a contract may fail in effect for a time for want of a subject-matter, and yet go into operation afterwards, when this want is supplied." 2 Am. Lead. Cases 463; see Dadman Manuf. Co. *v.* Worcester Mutual Fire Ins. Co. 11 Met. (Mass.) R. 420.

[1] Smith Mer. Law, 259; *ante*, § 193.

[2] 2 Am. Lead. Ca. 457; *ante*, Intr. § 11; Tillou *v.* Kingston Mutual Ins. Co. 7 Barb. (N. Y.) Sup. Co. R. 570; Etna Fire Ins. Co. *v.* Tyler, 16 Wend. (N. Y.) R. 385; Niblo *v.* North American Ins. Co. 1 Sand. (N. Y.) Sup. Co. R. 551; see De Bolle *v.* Pennsylvania Ins. Co. 4 Whart. (Penn.) R. 68; Newton's Adm'r *v.* Douglas, 7 H. & Johns. (Md.) R. 417.

[3] Indeed, says Ellis, marine policies in England were formerly in blank as to the insured, until, some mischiefs having arisen, the law was altered by a statute of 25 Geo. 3, c. 44, which statute having been productive of inconvenience was subsequently repealed by statute 28 Geo. 3, c. 26, which, though it restrains the making of policies in blank as a general rule, renders it necessary only to insert the name of one or more of the persons interested in the property insured, or of the consignor or consignees, or of the person resident in Great Britain who shall receive the order for, or effect such policy, or of the person who shall give the order to the agent immediately employed to negotiate or effect such policy. The right to assign or give the benefit of a marine policy, when the property has been transferred also, does not appear to have ever been disputed, (See *ante*, Intr. § 11; 1 T. R. 22; 1 T. R. 745.) Another distinction may also be observed between marine policies and those against fire. It is sufficient if a marine policy be effected after the interest in the property commences, if it be made in time to meet the risk insured against, (2 Taunt. R. 237,) for the statute 13 Geo. 3, c. 48, s. 1, does not extend to marine policies, and such a restraint would be

§ 200. It has been said, that it is not easy to see why the personal nature of a contract against fire, and its insusceptibility of being attached to, and passed with the property, should render the consent of the insurer necessary to a valid assignment of a policy against fire, and not of a marine policy, as to which no such assent is necessary.[1] But the reason why a policy is not assignable without the consent of the assured, or under certain conditions, or with certain formalities, (which must be strictly complied with,) is a reliance, in a considerable degree, upon the character of the assured. There is infused in the contract of fire insurance, something more of the nature *delectus personæ*, or fault in the assured.[2]

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highly prejudicial to commerce; but have an interest in the property at the time of effecting an insurance against fire, as well as when the loss happens. Ellis on Fire and Life Ins. 76, 77; and see *ante*, Ch. IV.

[1] 2 Am. Lead. Ca. 460.

[2] Etna Fire Ins. Co. *v.* Taylor, 16 Wend. (N. Y.) R. 385, 396; Lane *v.* Mutual Fire Ins. Co. 3 Fairf. (Me.) R. 44; Tillou *v.* Kingston Mutual Fire Ins. Co. 7 Barb. (N. Y.) R. 570; Abbott *v.* Hampden Mutual Fire Ins. Co. 17 Shep. (Me.) R. 414; Niblo *v.* North American Ins. Co. 1 Sand. (N. Y.) Sup. Co. R. 551; and see *ante*, § 55. In England, by the rule of the common law, strengthened by this sort of consideration, a policy of fire insurance is not assignable, and where by the terms of the contract it is made transferable under certain conditions, or with certain formalities, these must be strictly complied with. See 1 Campb. R. 237; 2 Maule & Sel. 290. In Scotland, every pecuniary obligation is assignable; and there is scarcely such a peculiarity in this contract of insurance against fire, as to deny to an assignee the benefit of the policy, unless by the terms of the policy, or of the proposals, (which are a part of the contract,) the power of assignment is put under particular restraints. In the city of Edinburgh there was erected, about a century ago, a company for friendly insurance against fire, (see *ante*, p. 36) consisting of a number of private contributors, who agreed to insure each other. The insurance was not personal, like the modern fire insurance, but the interest, and stock, and benefit were inseparably annexed to the houses insured as long as the contribution was continued. This sort of insurance, and the right to the share in the society, is transferred with the house; and the value of the stock at last rose so high, that it has long made a considerable addition to the right of property, and as such is paid for in bargains and sales." 1 Bell Comm. on the Law of Scotland, 543.

"Generally speaking," says Marshall, C. J., "insurances against fire are made in the confidence that the assured will use all the precautions, to avoid the calamity insured against, which would be suggested by his interest." [1]

§ 201. The mode of alienation is immaterial, so that if the language of the charter of a fire insurance company is, — "When the house or other building insured shall be alienated by sale or otherwise, the policy shall thereupon be void," the petition of the assured to be decreed a *bankrupt*, and an assignee in bankruptcy has been appointed, and the right of the assured is sold by the assignee, it is an alienation by the assured.[2]

§ 202. In Dadman Manufacturing Company *v.* Worcester

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[1] Columbian Ins. Co. *v.* Lawrence, 2 Peters, (U. S.) R. 25. See *ante*, § 122–136.

[2] Adams *v.* Rockingham Mutual Fire Ins. Co. 16 Shep. (Me.) R. 292. It appeared in this case, that D. and L. were the joint owners of the building and machinery upon which insurance was obtained, and afterwards destroyed; that subsequent to the execution of the policy, and before the loss, D. conveyed in mortgage his interest for the security of the sum of four hundred dollars, and was afterwards decreed a bankrupt upon his own petition; and the remaining right in him, after his bankruptcy, was sold by his assignee subsequent to the loss. L. conveyed by a deed absolute upon its face, his interest, after the insurance and before the loss, and took back a written instrument, not under seal, for a reconveyance of the same upon payment of the amount due to his grantee, and the amount for which he was liable to the grantor. By the petition of D. to be decreed a bankrupt, and the subsequent decree, in the language of the court, — "He was absolutely divested of all his property and the same was vested in the assignee. U. S. Bankrupt law of 1841, § 3. It is suggested in argument, that the proceedings in bankruptcy might have been stayed, and the decree of bankruptcy reached; consequently the property would revest in the former owner. This is a contingency too remote to be considered the foundation of a remaining insurable interest in the bankrupt. He had no power to reclaim the property after it had vested absolutely in the assignee. He had no right thereto in law or equity, by any contract executed or executory. One may be interested in the avails of the property alienated, and have no right whatever to the property itself."

Fire Insurance Company, in Massachusetts,[1] the facts were, that the assured, being in embarrassed circumstances, assigned their property, including the premises insured, to Dadman, Church, and Lord, as trustees, to sell the same and pay the debts secured by the assignment; and the deed of assignment contained only a qualified release of the assignors. It was said by the plaintiffs, that the deed was fraudulent and void against creditors, by force of the statutes of Massachusetts of 1836 and 1838. It nevertheless does not lie with the assignors, the court held, to aver their fraud in making their deed, in order to avoid the title made by them under it, and thus be allowed to fall back upon their former title. The insured property was sold, by order of a court of equity, for whom it might concern. It was held, that the conveyance was an alienation of the insured property, within the meaning of the policy, and that the assured could not avoid their conveyance, and fall back upon their original title, by averring that the conveyance was void against their creditors, by force of the insolvent laws.

§ 203. In a policy of insurance against fire it was stipulated, that, "when the property insured should be alienated by sale or otherwise, the policy should thereupon be void." The insurance was effected by a mutual fire insurance company, and it appeared, that it was upon a store and *two hundred dollars on the stock of goods* therein, for the period of six years. During the existence of the policy, the assured sold all the goods, and leased the store by parol to the purchaser; who continued to occupy the same, selling the goods for about six months; when the assured took back both the store and the remaining stock of goods. It was held, that this was not an alienation of the store, within the meaning of the policy; and furthermore, that, notwithstanding this stipu-

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[1] Dadman Manuf. Co. v. Worcester Mutual Fire Ins. Co. 11 Met. (Mass.) R. 429.

lation, the policy would attach to *any goods* the assured might have in the store, at any time within the period of the six years, not exceeding the amount insured. In giving judgment the court said: — "As to the goods, we are clear that the policy was intended to cover, and did cover whatever goods the plaintiff might have in his store, at any time during the continuance of the risk, not beyond the amount actually insured. A construction limiting the policy to the goods actually in the store at the time the insurance was effected, would defeat the very object of the assured, and so it must have been understood by the insurer. The plaintiff's business was trade, the vending of goods from his store. According to the construction put upon the policy by the company, the plaintiff has no security except upon the goods actually in the store when the policy was issued, and when those were disposed of their liability was at an end. We cannot listen, for a moment, to such a suggestion. A policy of insurance being a contract of indemnity, must receive such a construction of the words employed in it as will make the protection it affords coextensive, if possible, with the risk of the assured." The court, in fact, considered it clear, that the risk was a continuing one, *to the amount specified*, upon such goods as the assured might have in the store within the term covered by the policy, and was not confined to such as were there at the time of assuming the risk.[1]

§ 204. A *feme covert* was tenant for life in one third of a lot of land, and tenant for years of the other two thirds; and her husband erected a house on the land, and caused it to be insured by a mutual insurance company, as his property. One article of the by-laws of the company was, that the policy should be void, if the assured should sell or alienate the property in whole or in part, without consent. During the exist-

[1] Lane *v.* Maine Mutual Fire Ins. Co. 3 Fairf. (Me.) R. 44; and see Dow *v.* Hope Ins. Co. 1 Hall, (N. Y.) R. 66; and *ante*, Chap. IV. § 73, *et seq.*

ence of the policy, the plaintiff and his wife conveyed to the reversioner her life-estate, on condition that the grantee should pay her a fixed sum annually during her life. The husband, at the same time conveyed to the reversioner all his interest in the other two thirds, and took back a mortgage upon the whole estate to secure the payment of several sums in annual instalments. The mortgagor entered into possession; and the house was afterwards destroyed by fire before any of the above-named sums became payable by him. It was held, that the conveyance aforesaid constituted such an alienation as defeated the policy.[1]

§ 205. A mortgage, unless in the case of a mutual insurance company, is not an alienation of such a kind as to defeat the policy; and the interest of a mortgagee of lands, after entry, for the purpose of foreclosing the mortgage, and before a foreclosure has taken place, cannot be transferred by an attachment and levy thereon, as the real estate of the mortgagee.[2] In the case just referred to, the court, after a careful review of the authorities, arrived at the following result, — "The breach of a condition in a mortgage in no respect changes the nature of the estate in the respective parties. Notwithstanding such breach the mortgagor is still considered the owner against all but the mortgagee; he may sell and convey the fee; may lease the land, if in possession; and in every respect deal with it as his own. The equity of redemption remains little, if at all, affected by an entry of the mortgagee, after breach of the condition; the rights of the mortgagor are not essentially impaired till foreclosure. It may be taken on execution against the owner, and disposed of as well after as before such entry; and the interest acquired by the creditor differs in no respect from that which he would

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[1] Abbott *v.* Hampden Mutual Fire Ins. Co. 17 Shep. (Me.) R. 414; and see Smith *v.* People's Bank, 11 Ibid. 185.

[2] Smith *v.* People's Bank, 11 Shep. (Me.) R. 185; and see *ante*, § 58, *et seq.*

have obtained, if made before breach of the condition. In both cases he would hold the land subject to redemption, and be obliged to account strictly for the net value of the rents and profits; if they should be equal to the amount of the debt secured by the mortgage, before the expiration of the time necessary to work a foreclosure, the mortgage would be discharged thereby as effectually, as by any other mode of payment. In the view of a court of equity, the rents and profits are incidents *de jure* to the ownership of the equity of redemption. In no sense, can they be the property of the mortgagee till foreclosure." [1]

§ 206. If the owner of real estate has contracted to convey the buildings insured thereon, at a future day, on payment of the purchase-money; and, between the date of the contract and the day of payment, the premises are destroyed by fire — the vendor being in possession, — it is not such an alienation as will vacate the policy. The legal title is in him; and there is no alienation of property which renders the defence of a *want of interest* in the thing insured, valid.[2]

§ 207. In Tittemore *v.* Mutual Insurance Company, in Vermont,[3] the holder of a policy of fire insurance executed a warrantee deed of the premises, and at the same time received back a deed of the same premises, with a condition annexed, that, if the grantor in that deed should pay to the grantee the sum of two thousand dollars within three years, and should allow the grantee in that deed to retain possession of the premises until that sum should be paid, then the second

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[1] See the relative interests of mortgagor and mortgagee, and their insurable nature, *ante*, § 58, *et seq.*; and Gorden *v.* Lewis, 2 Sumn. (Cir. Co.) R. 143; Fay *v.* Cheney, 14 Pick. (Mass.) R. 399; Conover *v.* Mutual Ins. Co. of Albany, 2 Comst. (N. Y.) R. 290.

[2] See, as to the interest of the assured, *ante*, Chap. IV.; Trumbell *v.* Portage County Mutual Ins. Co. 12 Ohio R. 365.

[3] Tittemore *v.* Mutual Ins. Co. 20 Vt. R. 146.

should be void, otherwise in force; and it appeared, that the grantor in the second deed never, in any form, agreed to pay the sum mentioned, but it was wholly optional with him whether to do so or not. It was held, that this amounted merely to a *conditional* sale, and was not such an alienation as would avoid the policy. "Looking," said Davis, J., who gave the opinion of the court, "at the matter in the point of light in which it is viewed by the courts, by the community, and it is to be presumed by the legislature, I should have no difficulty in saying, that if this transaction be not plainly distinguishable from the ordinary one of a sale upon a credit of three years, with the usual lien upon the premises as security for ultimate payment, it ought to be regarded as an *alienation*, and consequently a forfeiture of right of action under the policy of insurance. As we construe this contract, as no part of the two thousand dollars was paid, or tendered within the time limited, whatever prospective conditional interest Van D'Waters ever had in the premises, had ceased before the destruction of the property, and the fee of the land, never being out of the plaintiff, — for I do not regard a conveyance and re-conveyance, when simultaneous, as divesting him of title at all, — there was no alienation, which by the terms of the statute could vitiate the policy." [1]

§ 208. The charter or by-laws of mutual insurance companies, it is believed, sometimes provide that, if the assured mortgages the property insured, the policy shall be void, unless with the insurer's consent.[2] Whenever the assured makes a conveyance of the property insured with such consent, the rights of the alienee are considered to stand very much upon

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[1] By the terms of the statute it was provided, that when any house or other building shall be alienated by sale or otherwise, the policy shall be void.

[2] See M'Culloch *v.* Indiana Mutual Ins. Co. 8 Blackf. (Ind.) R. 50; and as to mutual, as distinguished from general companies, see *ante*, § 10, p. 45, and § 146, p. 176.

the same footing with those of an assignee of a marine policy, where no such consent has been given.[1]

§ 209. In Jackson *v.* Massachusetts Mutual Fire Insurance Company,[2] a clause in a policy against fire, provided, that if the building insured should be alienated by sale or otherwise, the policy should be thereupon void; and another clause provided, that where any estate mortgaged should be taken possession of by the mortgagee for breach of the condition, the policy should thereupon be void; it was held, that the policy did not intend to restrain the assured from conveying in mortgage, and that such a conveyance would not avoid the policy, so long as he remained in possession, and no entry was made for foreclosure. In giving judgment in this case, the court say: — "The defendants contend that the term *alienation* is here used in its broadest sense, and as embracing the case of a conveyance by mortgage as well as that of an absolute transfer of the whole interest. It seems to us that this is an erroneous view of the question, and the improbability of such, having been the purpose of that rule, is much strengthened from the consideration of the frequency of this mode of transfer, and the numerous cases of liens of this character created for temporary purposes, and to an amount very small in comparison with the value of the property mortgaged."

§ 210. A house is insured against fire by a policy containing a provision that it is to have no effect if assigned, unless the assignment be allowed by the insurance company. The owner and assured makes a written contract, by which he agrees to sell to A. the house, with the lot on which it stands; and A. agrees to procure and assign to the vendor the bond of a third person, for the purchase-money, and to execute a mortgage of the property for securing the payment; the con-

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1 See 2 Am. Lead. Ca. 460; and *ante*, Introd. § 11.

2 Jackson *v.* Massachusetts Mutual Fire Ins. Co. 23 Pick. (Mass.) R. 418.

tract to be fulfilled on A.'s part within a month. A. fails to perform his contract within the month, and five days afterwards, and while it is still unperformed, the house is consumed by fire. Subsequently, the contract is carried into effect by the parties. In an action by the vendor against the insurance company to recover the value of the house, the parties to the suit, in addition to the foregoing facts, agree that both before and after the execution of the written contract for the sale of the premises, it was agreed *by parol* between the vendor and vendee, that the former should assign the policy of insurance to the latter. Reserving, however, the question of law, whether the said parol agreement can be admitted, either as a distinct contract, or for the purpose of affecting the terms of the written contract of sale, it was held, that the assured was entitled to recover, notwithstanding the contract of sale, and the subsequent performance of it; first, because the purchaser if sued in equity for specific execution, might have set up the parol agreement to assign the policy, and thereby entitled himself to an abatement for the loss of the house; secondly, because, by a stipulation for a mortgage, the assured retained an insurable interest in the premises, which gave him an immediate right of action against the insurance company upon the happening of the loss. If the contract executed would not extinguish the insurable interest, the contract executory surely would not.[1]

§ 211. As has been before stated,[2] fire policies cannot, at law, be transferred from one to another, without the consent of the underwriter; at least before a loss happens. There are cases in which the charter of a fire insurance company makes provision that an action may be brought in the name of an assignee; and though, in such case, courts of law cannot entertain a suit in the name of an assignee, yet they will

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[1] Fire and Marine Ins. Co. of Wheeling *v.* Morrison, (Appeal,) 11 Leigh. (Va.) R. 354.

[2] *Ante*, Introd. § 11.

always protect the right of the assignee. Where there is a transfer of the policy, either under the charter, or by the consent of the underwriter, the assignee cannot recover upon it, in the case of loss, in his own name; the general rule applicable to personal contracts being, that when they are assigned, the action for a breach must be brought in the name of the assignor, except where the defendant has expressly promised the assignee to respond to him. Notwithstanding there be a mortgage on the property insured, made by the assured, and an assignment of the property to the mortgagee, with the consent of the underwriter, a suit upon the policy to recover for a loss must be brought in the name of the assured.[1]

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[1] Where, in sustaining a suit by an assignee of a chose in action against the debtor, on a promise of payment made by the latter, the Supreme Court of Massachusetts held the following language: "If, on examining the declaration, aided as it is by the verdict, we can find a legal cause of action substantially set forth, we are bound to render judgment upon it for the plaintiffs. We have accordingly considered the facts in this case as showing an assignment to the plaintiffs by Head, and the other original debtors respectively, of so much of their money in the defendant's hands; an assent thereto by the defendant, and a promise by him to the plaintiffs to pay the same to them accordingly. The general principle has been long well settled, that such an assignment, with notice to the defendant, imposes on him an equitable and moral obligation to pay the money to the assignee; and although such an obligation is not sufficient to support an implied assumpsit, so as to enable the assignee to maintain an action in his own name, yet it is a good consideration for an express promise to that effect." Crocker *v.* Whitney, 10 Mass. R. 316. The general principle laid down in this case, was recognized in Geer *v.* Archer, 2 Barb. (N. Y.) R. 420; and its reasoning was adopted by the Supreme Court of Vermont, in Moore *v.* Wright, 1 Vt. R. 57; and by that of New York, in Compton *v.* Jones, 4 Cow. (N. Y.) 13; and is supported by the prior decision of Steward *v.* Eden, 2 Caines, (N. Y.) R. 150; see 2 Am. Lead. Cases, 139–149. In some form or other, the decisions above cited have been very generally followed in this country. *Ibid.;* Mowry *v.* Todd, 12 Mass. R. 281; Jones *v.* Walton, 13 Mass. R. 304; Wilson *v.* Hill, 3 Met. (Mass.) R. 66; Ceriner *v.* Hodgson, 3 N. Hamp. R. 82; Cleaton *v.* Chambliss, 6 Rand. (Va.) R. 16; Ashton *v.* Contee, H. & Johns. (Md.) R. 351; Tiernan *v.* Jackson, 5 Peters, (U. S.) R. 580, 597.

§ 212. There may be an original promise to the assignee, to indemnify him, whilst he retains an interest in the estate; and the exemption of the underwriter from further liability to the vendor; and the premium already paid for insurance, for a term not yet expired, are a good consideration for such promise, and constitute a new and valid contract between the underwriter and the assignee.[1] If the act of incorporation prescribe that an assignee of the assured, with the insured property, may sue in his own name, such assignee must aver, that he has become the purchaser or assignee of the subject insured; and a general averment of the plaintiff's interest is insufficient.[2]

§ 213. It appeared, that after the assignment of a policy which was relied on as having avoided the contract, an assessment had been made on the plaintiffs under the premium note signed by them, at the period of effecting the insurance. The assessment, and its subsequent payment, were relied on as amounting to a waiver of the forfeiture, and an assent to the assignment of the policy. It was, however, held by the court, that as the contract was absolutely avoided by the condition, it could not be revived by the subsequent acts of either or both the parties.[3]

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[1] Wilson *v.* Hill, 3 Met. Mass. R. 66; and see Mowry *v.* Todd, 12 Mass. R. 281; Carroll *v.* Boston Marine Ins. Co. 8 Mass. R. 515; Carpenter *v.* Providence Washington Ins. Co. 16 Peters, (U. S.) R. 495; Bodle *v.* Chenango County Mutual Ins. Co. 2 Comst. (N. Y.) R. 53.

[2] Jessel *v.* Williamsburg Ins. Co. 3 Hill, (N. Y.) R. 88, and cases therein cited; Munn *v.* Herkimer Ins. Co. 4 Hill, (N. Y.) R. 187; Traders Ins. Co. *v.* Robert, 9 Wend. (N. Y.) R. 404; Conover *v.* Mutual Ins. Co. 1 Comst. (N. Y.) R. 290.

[3] Smith *v.* Saratoga Ins. Co. 3 Hill, (N. Y.) 508. The ground thus taken was supported by an argument drawn from the analogous case of conditions of defeasance attached to estates for years, as to which it was said to be well settled, that where the effect of the provision is to avoid the estate, no subsequent waiver can restore its existence. But the instance thus adduced in support of the proposition, that contracts conditioned to

§ 214. Any defence which would have been available against the assignor of the policy, as a contract of insurance, or without an alienation of the property, will be equally so against the assignee; and, therefore, it does not appear to be essential to guard by stringent provisions against a transfer merely of the policy. Where there is a proviso in a policy, that the interest of the assured in the policy should not be assignable without the consent of the company, in writing; and that in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent, the policy shall be void. The words thus employed were construed by the Supreme Court of the United States, as meaning the interest in the property insured, and not in the mere contract of insurance.[1] But as to what is the proper construction of a clause like that above stated, there is a discrepancy in the authorities; and a different meaning was attached to the words of it, in Smith *v.* Saratoga Insurance Company, in the State of New York.[2] In that case it was held, that the whole

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become void, upon the happening of a particular contingency, cannot be kept alive after the contingency happens, even by the consent of the parties, would appear to invalidate rather than support that conclusion, for it appears to be well settled, that if the right to take advantage of the breach of a condition, in avoidance of a contract of lease, be waived by the party in whose favor it was intended, the estate will continue upon the same footing as if the condition had never existed, or had never been broken. Doe *v.* Bancks, 4 B. & Ald. R. 401; Clark *v.* Jones, 1 Denio, (N. Y.) R. 516. The same doctrine has been applied in the case of other contracts qualified by a condition of absolute avoidance, on the obvious ground that if treated as void upon the commission of the breach, the party by whom it is committed, by violating one of his obligations, would escape from the performance of others. Roberts *v.* Davy, 4 B. & Adol. R. 664; Mulins *v.* Freeman, 6 Bing. R. (New Cases,) 395. [The above is copied from 2 Am. Lead. Cases, 520, 521.] See Wilson *v.* Hill, 3 Met. (Mass.) R. 68.

[1] Carpenter *v.* Washington Ins. Co. 16 Peters, (U. S.) R. 495. And see 2 Am. Lead. Cases, 519. To the learned authors of this valuable work the author has been under obligation not only for a collection of authorities, but for able and instructive comments upon them.

[2] Smith *v.* Saratoga Ins. Co. 1 Hill, (N. Y.) R. 497.

effect of the clause was strictly confined to a provision against the assignment of the policy, and had no relation to the sale of the subject-matter of the insurance. The argument was, that the policy being in its nature assignable, the intention of the parties must be supposed to have been directed to it, rather than to the property itself, the assignment of which would have avoided the insurance, apart from any proviso, both under the general rule of law, and the express words of the charter incorporating the company. This construction was adhered to when the same case was brought before the court on a subsequent occasion.[1]

§ 215. The question presented in Granger *v.* Howard Insurance Company,[2] was, whether an action could be sustained in the name of the assignee? The court were of opinion, that, at common law, it could not be done, though it might in equity. But there, the court held, the suit would not be entertained unless it appeared that the assured refused the use of his name for the benefit of the assignee. The statute incorporating the company expressly provided, — "that in case any person insured by the defendants shall sell and convey, or assign the *subject insured* during the period of time for which it is insured, it shall be lawful for such assured to assign and deliver to the purchaser such policy, and such assignee shall have all the benefit of such policy, and may bring a suit in his own name: provided, before any loss happens, notice shall be given of the assignment; and the defendants, when notified, shall be at liberty to retain a ratable proportion of the premium, and be exonerated from the risk. This statute gives an action in the name of the assignee of the policy, provided he has become the purchaser or assignee of the *subject insured* subsequent to the insurance and before

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[1] 13 Hill R. 508.

[2] Granger *v.* Howard Ins. Co. 5 Wend. (N. Y.) R. 200; and see Marsh. on Ins. 800.

the loss. This being the foundation of the plaintiff's right of action, he is bound to show that he comes within the provisions of the act. In Carter *v.* United Insurance Company,[1] the chancellor refused to entertain jurisdiction, saying the remedy was at law, and the nominal plaintiff would not be permitted to defeat the action.

§ 216. Lynch *v.* Dazlell,[2] and Sadlers Company *v.* Badcock,[3] show, that upon an assignment or any transfer of the property insured, the assignee should take especial care to have the policy *regularly* transferred to him by the proper indorsement at the office.[4] Undoubtedly the transfer must be made in comformity with any particular well known rule prescribed.

§ 217. The assignment may be accepted in behalf of the company by a duly constituted *agent.* Incorporated companies whose business is necessarily conducted altogether by *agents,* should be required at their peril to see to it, that their officers and agents whom they employ, not only know what their powers and duties are, but that they do not habitually, and as a part of their system of business, transcend those powers. Were it otherwise, third persons could not deal with them with any degree of safety. They can have no access

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1 Carter *v.* United Ins. Co. 1 Johns, (N. Y.) Ch. R. 463.

2 Lynch *v.* Dalzell, 3 Bro. Parl. Ca. 49, and *ante,* § 55, 193.

3 Sadlers Co. *v.* Badcock, 2 Atk. R. 554, and *ante,* Intr. § 43, and Treat. § 55, 193.

4 In the proposals of the Hand-in-Hand fire office, in England, it is declared, that if the premises insured should be assigned, the assignment must be entered at the office. The other English offices give notice generally upon the policy, that it shall be of no force if assigned, unless such assignment be allowed by an entry in the books of the office, or indorsed on the policy. So that it seems to be a settled rule in all the English offices, not to allow any transfer of any property, without the consent of the managers. This is perfectly reasonable. Marsh. on Ins. 696, 697; and see § 122–135.

to the by-laws and resolutions of the board, and no means of judging in the particular instance whether the officer is, or is not within the prescribed limits.[1] When by the terms of a policy, an assignment of the interest of the assured is prohibited, "unless by the consent of the company manifested in writing," and the *secretary*, on an application to him at the office of the company, indorsed upon the policy and subscribed a consent; his authority to do so, in the absence of evidence to the contrary, is to be presumed. Even were it necessary to prove his authority, a formal resolution of the board of directors need not be shown. Evidence that the secretary, he being the sole agent of the company in transacting business at the office, has been uniformly in the habit of giving such consent in writing, and has made regular entries of his acts in the books of the company, without objection or repudiation on the part of the company, is enough at least to carry the question of authority to the jury.[2]

§ 218. In regard to an agent of the assured, it is not alone his duty to conduct himself with fidelity and punctuality towards his employer; but he is bound likewise to observe the strictest veracity and candor towards the underwriter. He cannot indeed be a faithful employee of one, without dealing honorably with the other; for any misrepresentation or concealment committed by the agent, will have the same effect in avoiding the policy as if it were committed by the assured himself, even though it be done without the privity or knowledge of the latter, or ignorantly. For it is a maxim in the law, that if one of two innocent persons must suffer by the fraud or negligence of a third, the loss shall fall on him who

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[1] Per Johnson, J., Conover *v.* Mutual Ins. Co. 1 Comst. (N. Y.) R. 290; and see Brown *v.* Williams, 15 Shep. (Me.) R. 252; McEvers *v.* Lawrence, 1 Hoff. (N. Y.) Ch. R. 172; Bodle *v.* Chenango County Mutual Ins. Co. 2 Comst. (N. Y.) R. 53.

[2] Conover *v.* Mutual Ins. Co. *ub. sup.*, and see on the subject of *the authority of agents of corporations*, Angell & Ames on Corp. Chap. IX.

trusted the third person.[1] If the assignor himself undertake to get the consent of the underwriter, he will be liable to him for all the consequences of neglecting or omitting to do so.[2]

§ 219. The question, whether the forfeiture of an insurance, conditioned to be absolutely void upon the breach of the stipulations entered into by the assured, is susceptible of being *waived* by the subsequent conduct of the underwriter, does not seem to have been fully presented for decision.[3] But in the case of Smith *v.* The Saratoga Insurance Company,[4] and also in that of Neely *v.* Onondaga Mutual Insurance Company,[5] the opinion expressed by the court was strong against the possibility of such a waiver. It has been considered, that "whatever may be the sounder view on this point, it is well settled that no act can have the effect of a waiver, unless it is shown to have been done with full knowledge that the forfeiture existed which is alleged to have been waived."[6]

§ 220. The case of Hurt *v.* Western Railroad Company,[7] was a case of an *equitable* assignment. A house, it appears, which was insured, was injured by a fire which was communicated by a locomotive engine of a railroad corporation, and the underwriters paid to the assured the amount of his loss, for which the railroad corporation was also by law responsible to him. It was held, that such payment did not bar the right of the assured to recover also of the railroad corporation, and

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1 Marshall on Ins. 208, 209. As to the general doctrine of misrepresentation and concealment see *ante*, Chapters VI. and VII.

2 Marsh. on Ins. 703; Wilkinson *v.* Coverdale, 1 Esp. R. 75.

3 See 2 Am. Lead. Cases, 521, 522.

4 Smith *v.* Saratoga Marine and Fire Ins. Co. 1 Hill, (N. Y.) R. 497.

5 Neely *v.* Onondaga Mutual Ins. Co. 7 Hill, (N. Y.) R. 49.

6 2 Am. Lead. Cases, 522; Allen *v.* Vermont Mutual Ins. Co. 12 Vt. R. 366.

7 Hurt *v.* Western Railroad Company, 13 Met. (Mass.) R. 99.

that the assured, by receiving payment of the underwriters, became trustee for them, and, by necessary implication, made an equitable assignment to them of his right to recover of the railroad corporation; and that underwriters, on indemnifying the assured, might bring an action in his name, for their own benefit against the railroad corporation, and that the assured could not legally release such action. The assured may first apply to whichever of these parties he pleases; to the railroad company, by his right at law, or to the insurance company by virtue of his contract. But, if he first applies to the railroad company, who pay him, he thereby diminishes his loss, by the application of a sum arising out of the subject of the insurance, to wit., the building insured, and his claim is for the balance. And it follows, as a necessary consequence, that if he first applies to the insurer, and receives his whole loss, he holds the claim against the railroad company in trust for the insurer. Where such an equity exists, the party holding the legal right is conscientiously bound to make an assignment, in equity, to the person entitled to the benefit; and if he fails to do so, the *cestui que trust* may sue in the name of the trustee, and his equitable interest will be protected.

§ 221. Where a party who had procured insurance against loss by fire upon buildings owned by him, assigned the policy, with the consent of the underwriters, to secure a mortgage debt owing by him, and a loss having occurred, a suit was brought on the policy in the name of the assured, and judgment obtained by the assignee, who, instead of enforcing payment of the judgment, coerced payment of the mortgage by a foreclosure in chancery; it was held, that the assured was entitled to the benefit of the judgment against the underwriters, although he had procured other insurance upon the same buildings, and had omitted to give notice thereof; it appearing that such second insurance was effected subsequent to the assignment, and whilst the beneficial interest in the policy was in the assignee. Although the assured assigned

the policy, and thereby gave the assignee a right to recover against the company the damage sustained, if it accrued while he was the assignee; and although the fire happened and the damage did accrue, and a judgment was recovered against the company for the damages, yet the company had not paid that judgment, or the mortgage for the payment of which the policy was assigned. The judgment was a valid judgment in favor of the assignee in the name of the assignor. Had the company paid the money, upon the judgment, it would have been the assignee's, but it would have been applied to the benefit of the assignor, by paying a debt he owed to the assignee. The assignee had a right to assign the judgment to whom he pleased, and the assured had the same right as any other individual to take an assignment of the judgment, and one which would be valid against the company.[1]

§ 222. It is obvious that the considerations which apply to the assignment of a fire policy before the loss, do not apply to a case where the assured, *after a loss*, assigns his right to recover that loss; such an assignment would stand on the same footing as the *assignment of a debt*, or right to recover a sum of money actually due, which, like the assignment of any other chose in action, would give the assignee an equitable interest, and a right to recover in the name of the assignor, subject, of course to set-off and all other equities.[2] In Bricta *v.* New York La Fayette Insurance Company,[3] the plaintiff, it appeared, effected a policy of insurance against fire with the company, "on goods and furniture contained in his counting room." After a loss had happened, he made an assignment of his property, for the benefit of certain creditors; and

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1 Robert *v.* Traders Ins. Co. 17 Wend. (N. Y.) R. 631.

2 Wilson *v.* Hill, 3 Met. (Mass.) R. 66; Dadman *v.* Worcester Mutual Fire Ins. Co. 11 Met. (Mass.) R. 429; 2 Am. Lead. Cases, 462; Hamm. on Ins. 127; Rider *v.* Ocean Ins. Co. 20 Pick. (Mass.) R. 257.

3 Bricta *v.* New York La Fayette Ins. Co. 2 Hall, (N. Y.) R. 572

assigned, among other things, his claims on the company. The company contended at the trial, that the assignment rendered the policy void. And *per curiam*, — "The restriction in the policy, against an assignment of the interest of the assured in it, evidently applies to transfers made before the loss happens. After that event, the rights of the plaintiff are fixed; his claim becomes a mere chose in action, and like any other chose in action, it is assignable in equity. The reasons which induce insurance companies to insert the restrictive clause in their policies, have no existence or application after the risk has ceased."

CHAPTER X.

OF NOTICE AND PRELIMINARY PROOF OF LOSS.

§ 223. "NOTHING," as Marshall says,[1] "can be more reasonable in a case where there is so great a temptation to fraud, than to require a testimonial from persons in public situations in the parish where a fire has happened, who have opportunities of informing themselves as to the characters of the insured, and the fairness of their claims; and who are not likely to connive at any fraud. 'It is a duty,' says Mr. Justice Lawrence, 'that the office owes to the public as well as to themselves, to take every precaution to protect themselves against fraud. And unless some such check as the present were interposed, the office would be holding out a premium to wicked men to set fire to their own houses.' Perhaps it may, some time or other, be thought advisable for all the insurance companies to agree among themselves to have this article revised, and put into a more unexceptional form, and to adopt it universally."

§ 224. One principal article, which is found in several of the English fire insurance offices, imports,[2] — "That persons insured sustaining any loss or damage by fire, are forthwith to give notice thereof at the office, and, as soon as possible afterwards, deliver in as particular an account of their loss and damage, as the nature of the case will admit of; and make proof of the same by their oath or affirmation, according

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[1] Marsh. on Ins. 705.

[2] Ibid. 704, 705.

to the form practised in the said office, and by their books of accounts, or other proper vouchers, as shall be reasonably required; and procure a certificate under the hands of the minister and church-wardens, together with some other reputable inhabitants of the parish, not concerned in such loss, importing, — that they are well acquainted with the character and circumstances of the person or persons insured, and do know or verily believe, that he, she, or they, really and by misfortune, without any fraud or evil practice, have sustained by such fire, the loss and damage, as his, her, or their loss, to the value therein mentioned. But, till such affidavit and certificate of such insured's loss shall be made and produced, the loss money shall not be payable. And, if there appear any fraud or false swearing, such sufferers shall be excluded all benefit by their policies."

§ 225. The construction of this article in England is, that the procuring the certificate is a *condition precedent*[1] to the payment of any loss; so that its being wrongfully refused will not excuse the want of it.[2] The argument, in the case just referred to, went to show, that if none of the inhabitants of the parish would certify, a certificate from the next, or of any other parish would have answered the purpose, but, said Lord Kenyon, the assured could not substitute other terms or conditions in lieu of those which all the parties to the contract had originally made. The article of the printed proposals requiring the certificate, though only referred to in the policy, is part of the contract, and is binding on the assured.[3]

§ 226. It is well settled, in this country, that the production of the certificate of loss is a *condition precedent;* and in

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[1] As to the nature of a *condition precedent*, *see ante*, § 142.

[2] West *v.* Lockyer, 2 H. Black. R. 574, and 6 T. R. 710; Marsh. on Ins. 707; and see Oldman *v.* Bewicke, 2 H. Black. R. 577, *n.*

[3] Routledge *v.* Burrell, 1 H. Black. 254; and Marsh. on Ins. 707.

general, persons who have sustained loss by fire, must give immediate notice to the office, and deliver a statement, supported by the evidence required by the rules of the respective offices; by the practice of some offices the certificate of the clergyman of the place, a sworn notary, or magistrate, is made one of the modes of evidence of the amount of the loss. In Columbian Ins. Co. *v.* Lawrence,[1] the stipulation was, that the assured was not entitled to recover or sue for a loss, until affidavit and proper certificate of loss are produced; and it was held by the Supreme Court of the United States, that this constituted a condition precedent to the right of action of the assured.

§ 227. In O'Neal *v.* Buffalo Fire Insurance Company,[2] the policy required the assured to procure and produce a certificate of the loss under the hand of a magistrate, notary public, or clergyman, *most contiguous to the place of fire;* and the plaintiff procured the certificate of a magistrate residing about one third of a mile from the place of the fire; but it was proved, that there were other magistrates and notaries then residing nearer to that place than himself. The court held, that the certificate by this magistrate was not a strict compliance with the condition of the policy.

§ 228. Although the assured must, in an action on a policy, prove the nature of his insurable interest, it is not necessary to state it particularly in the preliminary proof in the first instance; the notice of the loss being distinguishable from the proofs. But it is a condition precedent that the assured should state the amount of the loss.[3]

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[1] Columbian Ins. Co. *v.* Lawrence, 10 Peters, (U. S.) R. 507; and see Dadman *v.* Worcester Ins. Co. 11 Met. (Mass.) R. 429. As to meaning of *condition precedent*, see *ante*, §§ 140, 142.

[2] O'Neal *v.* Buffalo Fire Ins. Co. 3 Comst. (N. Y.) R. 122.

[3] See 2 Phill. on Ins. § 1805; and § 1807, referring to Scott *v.* Phœnix

§ 229. Still, the clause in a policy of insurance requiring the certificate of the nearest magistrate or notary, as to the character and circumstances of the assured, and the amount of the loss, does not require a strict *literal* compliance, more than any ordinary contract. In determining the *contiguity* of the magistrate to the place of the fire, the place of his residence, and not his residence, will be regarded; and nice calculation of distances will not be gone into to ascertain the nearest magistrate who might have given the certificate; the proximity of the magistrate to the place of the fire, is all that can be required. And whenever the certificate of the nearest magistrate is defective, the underwriter will not be allowed to insist upon its insufficiency, if he has refused to return it to the assured for the purpose of being corrected; the duty of the underwriter, in such cases, being not only to return the preliminary proofs, but to point out what he deems defects.[1]

§ 230. In respect to the *diligence* required on the part of the assured, in giving notice, there must be no unnecessary delay, nothing which the law calls *laches*. Therefore, in an action on a fire policy, where the condition annexed to the policy required the assured *forthwith* to give notice of the loss to the underwriter, it was held necessary to aver that notice was forthwith given.[2] "*Forthwith*," said the court, by Sutherland, J., "means immediately, without delay, directly." The declaration in this case, alleged the building to have been consumed on the *twenty-third of February*, 1827, and that the plaintiff gave notice thereof to the company, on the *second of April* ensuing; it was held not a compliance with the condi-

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Ins. Co. Stuart (Lower Canada) R. 354; Hammond on Ins. 110; Dawes *v.* North River Ins. Co. 7 Cow. (N. Y.) 452; Catlin *v.* Springfield Ins. Co. 1 Sumn. Cir. Co. R. 434.

[1] Turner *v.* North American Ins. Co. 25 Wend. (N. Y.) R. 374; and see 2 Phill. on Ins. § 1865, Cornell *v.* Le Roy, 9 Wend. (N. Y.) R. 163.

[2] Inman *v.* Western Fire Ins. Co. 12 Wend. (N. Y.) R. 452.

tion. Even if the law would allow an excuse for delay, it is difficult to conceive of a reasonable apology for negligence like this.[1]

§ 231. The rule is, that the condition as to notice imposes upon the assured due diligence under all the *circumstances of the case.* Where the thing required to be done is complicated, composed of a variety of parts incapable, in the nature of things, of being instantly accomplished by a single act or volition, the parties will be understood, when they use language of such prompt and imperative character, as "forthwith," as intending merely that there shall be no unnecessary delay in the performance.[2]

§ 232. In the case of the Columbian Insurance Company *v.* Lawrence, in the Supreme Court of the United States,[3] it appeared that one of the fundamental rules of an insurance company insuring against loss by fire, provided, that any person insured sustaining a loss by fire, "shall, as soon as possible thereafter, deliver in as particular an account of their loss or damage, signed with their own hands, *as the nature of the case will admit of*, and make proof," &c., "and shall procure a certificate under the hands of a magistrate," &c., "not concerned in such loss," &c., "importing that they are acquainted with the character and circumstances of the person insured," &c., "and until such affidavit and certificate are produced, the loss claimed shall not be payable." By Mr. Justice Story, who delivered the opinion of the court: "We are of opinion that the words 'as soon as possible,' cannot be drawn down to fix the construction of the clause respecting the certificate. We think the true intent and meaning of it is, that the certifi-

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[1] Edwards *v.* Baltimore Fire Ins. Co. 3 Gill, (Md.) R. 176.

[2] Per Sutherland, J., in Inman *v.* Western Fire Ins. Co. 12 Wend. (N. Y.) R. 452; St. Louis Ins. Co. *v.* Kyle, 11 Miss. R. 278; Heath *v.* Franklin Ins. Co. 1 Cush. (Mass.) R. 257.

[3] Columbian Ins. Co. *v.* Lawrence, 10 Peters (U. S.) R. 507.

cate must be procured within a reasonable time after the loss. It would be a most inconvenient course to adopt a different construction, not required by the terms of the clause or the context; as it would make the material inquiry, not the production of the certificate, but the possible diligence in proving it."

§ 233. The question is not analogous to the question of diligence exacted by the law, from the holder of a dishonored note or bill, desirous of fixing the liability of previous parties to such instruments. And, in ordinary cases, whether due diligence has been used by the assured, or whether he has been guilty of unnecessary procrastination, under all the circumstances, it is plain, must be a question of fact to be determined by the jury.[1]

§ 234. A policy of insurance, executed in Baltimore, against fire on merchandise, such as is kept at a country store, in a frame building, located, &c., required the assured *forthwith*, to give notice to the underwriters, of any loss. The mail left the place of loss, for Baltimore, on Monday, Wednesday and Friday. The fire took place on Friday night, and the assured did not give notice by mail on Wednesday. All the circumstances attending the condition of the property, and the efforts of the assured to collect and preserve it in its damaged state, were left to the jury to determine whether the assured was not so occupied on Tuesday, in doing every thing in his power for the safety and protection of the property, as to show he had neither time nor opportunity to put the notice in the post-office, in season. The court thought there was error in the court below in giving to the jury the instruction that the plaintiff was not entitled to recover, because he had not offered evidence of a seasonable notice as required by the condition of the policy.[2]

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[1] Edwards *v.* Baltimore Fire Ins. Co. 3 Gill, (Md.) R. 176.

[2] Edwards, &c., *ub. sup.*

§ 235. Although the question of the necessity of preliminary proofs is for the court, the jury may determine the authenticity of the papers; hence, where under a general objection to *ex parte* affidavits, the court permitted them to be left to the jury, as evidence that preliminary proof had been given.[1]

§ 236. The neglect on the part of the assured to give notice of loss, if he has assigned the policy with the consent of the insurer, is of no importance. In Cornell *v.* Le Roy,[2] it was made an objection to the notice, that the notice was given by an assignee of the policy, the policy having been assigned with the consent of the insurer; but it was held to be a compliance with the condition, that all *persons insured*, shall forthwith give notice.

§ 237. If preliminary proofs are made forthwith after the fire, and delivered to the insurer at his request, before copies are taken, and he subsequently, after repeated evasions, finally refused to furnish copies; a new set of preliminary proofs furnished as long as *four months* after the fire, will, under the circumstances, be in season.[3]

§ 238. Cases of fire insurance, it has been considered, seem, less than marine, to require *particularity* in the notice of loss; losses by fire more usually falling under the inspection of the insurer's agents. So that a general notice will be sufficient to enable the underwriters seasonably to acquire a more minute knowledge of the loss, if such knowledge be desirable.[4]

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1 Klein *v.* Franklin Ins. Co. 1 Harr. (Penn.) R. 247.

2 Cornell *v.* Le Roy, 9 Wend. (N. Y.) R. 163.

3 Ibid.

4 Huff *v.* Marine Ins. Co. 4 Johns. (N. Y.) R. 132; Ocean Ins. Co. *v.* Francis, 2 Wend. (N. Y.) 64. And see Lenox *v.* United Ins. Co. 2 Johns. (N. Y.) Cases, 224; Johnson *v.* Columbian Ins. Co. 7 Johns. (N. Y.) R. 315; Barker *v.* Phœnix Ins. Co. 8 Johns. (N. Y.) R. 307. See *ante*, § 191.

§ 239. The question in Norton *v.* Rensellaer and Saratoga Insurance Company,[1] was, whether a notice was in compliance with one of the proposals in the policy; and by Savage, Ch. J., in behalf of the court: — "That proposal is brought over from the English policies, where it is held to be a condition precedent; and the clause connected with it, which relates to the certificate of third persons, has been the subject of several decisions confining the plaintiff with great strictness to the persons named. I am not aware of any case which goes into the form of the notice, and the affidavit of the party. Undoubtedly these must be furnished according to the policy, a certain number of days before an action can be brought; but it is another question what they should contain. The clause requiring proof of loss in marine policies, has been construed with considerable liberality. The court have looked to circumstances; and required no more information of the party than what appeared to be within his control." In Lawrence *v.* The Ocean Insurance Company,[2] Thompson, J., in delivering the opinion of the court, says, — "the clause requires only reasonable information to be given to the underwriters; so that they can be enabled to form some estimate of their rights and duties, before they are obliged to pay. The clause has always been liberally expounded; and is construed to require only the best evidence of the fact which the party possesses at the time. Such has been the uniform construction put upon it by this court."

§ 240. In Catlin *v.* The Springfield Insurance Company,[3] the policy which was against fire, contained the condition, that "all persons assured, and sustaining loss or damage by fire, are forthwith to give notice thereof to the company, and

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1 Norton *v.* Rensellaer and Saratoga Ins. Co. 7 Cow. (N. Y.) R. 645.

2 Lawrence *v.* Ocean Ins. Co. 11 Johns. (N. Y.) R. 260. See 2 Johns. R. 136; 8 Ib. 317.

3 Catlin *v.* Springfield Ins. Co. 1 Sumn. (Cir. Co.) R. 434.

as soon after as possible, to deliver in a *particular account of such loss or damage*, signed with their own hands, and verified with their oath and affirmation, and also, if required, by their books of account and other proper vouchers." And to "procure a certificate under the hand of a magistrate, notary public, or clergyman, most contiguous to the place of fire, and not concerned in the loss, nor related to the assured or sufferers, that they are acquainted with the character and circumstances of the person or persons insured; and do know, and verily believe, he, she, or they, really and by misfortune, and without fraud or evil practice, have sustained, by such fire, loss and damage to the amount therein mentioned. And until such proofs, declarations and certificates are produced, the loss shall not be deemed payable." It was held, that the *particular account* required, meant only "an account of the loss, that is, of the thing or value lost; or of the damage, that is, of the amount of injury sustained. But the assured was not required to state *how* the loss happened, or *the cause* or *occasion* of it. But good faith and the true spirit and intention of the contract require the assured to disclose, at least, all the *documentary* evidence in his possession, touching the nature and extent of the loss.[1]

§ 241. The sufficiency of notice is not to be determined solely by reference to general principles applicable to other policies, but in part also upon the peculiar provisions of the policy, or the stipulation it contains regulating the subject. In Heath *v.* Franklin Insurance Company,[2] the provisions relative to notice of loss are very general, as thus: "And in case of loss, the same is to be paid, without any deduction, in ninety days after proof thereof." "And the assured agrees, that in case of any loss or damage, the said company shall have the right to replace the articles lost or damaged, with others of the same

[1] Huff *v.* Marine Ins. Co. 4 Johns. (N. Y.) R. 132; Allegre *v.* Merchants Ins. Co. 6 H. & Johns. (Md.) R. 408.

[2] Heath *v.* Franklin Ins. Co. 1 Cush. (Mass.) R. 257.

kind and equal goodness, at any time within ninety days after notice of the loss." The court were of opinion that, "considering the general terms in which notice is required by the provisions of the policy, and applying a principle of law which is applicable in cases of a like character, that a very general notice may be regarded as sufficient." [1]

§ 242. There may be, on the part of the underwriters, a *waiver* of notice,[2] as in Sexton *v.* Montgomery County Mutual Insurance Company,[3] wherein it appeared that an assured against loss by fire, attempted to comply with the conditions of the policy in respect to the preliminary proofs, by making and serving on the underwriters his own affidavit of the loss. Subsequently, the underwriters, without notifying him that his affidavit was insufficient, made an investigation of the circumstances attending the loss, and took affidavits to satisfy themselves; which affidavits were delivered to an agent of the underwriters, within the time limited for making the preliminary proof. It was held, that the jury might find that the delivery of the additional affidavits to the agent was a delivery to the underwriters; and that the proof thus made was a substantial compliance with the terms of the contract.

§ 243. The act of incorporation and by-laws of a mutual insurance company having provided, that in case of loss the assured should, within thirty days thereafter, give notice thereof in writing at the office of the company in a certain manner, and with certain particulars specified in the by-laws; and notice of a loss having been given to the company by their

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[1] The notice was in very general terms, conveying no intelligence as to the amount of damage, containing no statement of the particular circumstances connected with the cause of the loss, and making no demand of any specific sum of money as an indemnity.

[2] Bodle *v.* Chenango Mutual Ins. Co. 2 Comst. (N. Y.) 53.

[3] Sexton *v.* Montgomery County Mutual Ins. Co. 9 Barb. (N. Y.) Sup. Co. R. 191.

agent, within the time limited, but not in the manner and with the particulars required, upon which the president of the company made an examination of the premises, and declined to pay the loss, without objecting to the form of the notice; it was held, that this was a waiver of the right of the company to any further or different notice. There was no doubt that the president obtained all the information which he desired; and any further notice, therefore, to the company, would have been wholly unimportant and useless.[1]

§ 244. Good faith and fair dealing is of the very essence of the contract of insurance, and hence an answer from underwriters, that "they would not settle the claim in any way," is a waiver of any imperfection in the preliminary proofs.[2] It is well settled in fire, as well as in marine insurance, that when underwriters make no objection to a deficiency in the preliminary proofs, or to the notice given, but rest their denial of liability upon other grounds, then there is a waiver of the objection of a defective notice. Any formal defect in prelimi-

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[1] Clark *v.* New England Fire Ins. Co. 6 Cush. (Mass.) R. 342.

[2] Frances *v.* Ocean Ins. Co. 6 Cow. (N. Y.) R. 404; O'Niel *v.* Buffalo Fire Ins. Co. 3 Comst. (N. Y.) R. 122. In Allegree *v.* Maryland Insurance Company, the following letter from the president of that company was introduced, — "I am instructed by the directors of this company, to inform you that the claim you make for the insurance on the cargo of the brig Eugene, has had their peculiar attention, and also that of Mr. Pinckney and Mr. Purviance, the result of which is that the company *decline the payment*, under a persuasion, sanctioned by those gentlemen, that the company are not answerable for the same." By the court, — "If they," (the underwriters,) "intended to refuse payment of the loss, because the invoice, a customary part of the preliminary proofs, had not been laid before them, it was their duty to have informed the assured, and their failure to do so, and the writing of such a letter, was a *waiver* of all further preliminary proofs. The letter itself is a plain, unequivocal notification to the plaintiff that his claim for indemnity will not be adjusted by the defendants; and, by necessary implication, gives him to understand, that all further offers of preliminary proofs would be useless. Allegree *v.* Maryland Ins. Co. 6 H. & Johns. (Md.) R. 408.

nary proof may be supplied whenever objection to pay a loss is put upon that ground.[1]

§ 245. Chancellor Walworth lays down the principle applicable to the above sort of cases in Etna Fire Insurance Company *v.* Tyler,[2] thus, "Good faith on the part of the underwriters, requires that, if they mean to insist upon a mere formal defect of this kind in the preliminary proofs, they should apprise the assured that they consider the same defective in that particular, or to put their refusal to pay upon that ground as well as others, so as to give him an opportunity to supply the defect before it could be too late; and if they neglect to do so, their silence should be held a *waiver* of such defect in the preliminary proofs, so that the same shall be considered as having been duly made according to the conditions of the policy." [3]

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[1] Bodle *v.* Chenango County Mutual Ins. Co. 2 Comst. (N. Y.) R. 53; McEvers *v.* Lawrence, 1 Hoff (N. Y.) Ch. R. 172; Dawes *v.* North River Ins. Co. 7 Cow. (N. Y.) R. 462; McMasters *v.* Westchester County Mutual Ins. Co. 25 Wend. (N. Y.) R. 383.

[2] Etna Fire Ins. Co. *v.* Tyler, 16 Wend. (N. Y.) R. 385.

[3] "The difficulty," says the Chancellor, "on this subject, however, is, that the question of waiver was not raised at the circuit, so as to give the underwriters an opportunity of showing that they had in fact insisted upon the want of a proper certificate as a necessary part of the preliminary proofs; the court having decided that the certificate produced was such a one as the condition of the policy required, which of course precluded all consideration of the question of waiver. Although the underwriters, if they make the objection in time, have a right to insist upon the production of such a certificate as is specified in the conditions of the policy, and from the proper person, before they shall be liable for the payment of the loss, I do not understand the rule to be so strict as to render it necessary that such certificate should be in the precise words mentioned in the policy, provided it is so drawn as evidently to mean the same thing. Even in the case of a warranty in a policy, although the language of the judges in many cases has been that it must be literally complied with, it has been held that a warranty to *sail* on a particular day was complied with, although the wind blew so that

§ 246. The objection was taken in the case of Tayloe *v.* Merchants' Fire Insurance Company, in the Supreme Court

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a sail could not be raised, and the master knew it was impossible to get the vessel to sea on that day, by his merely warping the vessel a little further down the river for the *bonâ fide* purpose of starting on the voyage insured, and putting the vessel in a better condition to proceed on her voyage to the port of destination as soon as the wind would permit her to go to sea. Cockrane *v.* Fisher, 2 Cromp. & Mees. R. 581. This decision was afterwards affirmed upon a writ of error to the exchequer chamber; the court, holding that a literal compliance with the warranty to *sail* on that day, was not necessary, if the vessel was *bonâ fide* and in fact started upon her voyage by warping her down the river, upon the day specified in the warranty. — 5 Tyrwhitt's R. 496. If I could be satisfied, therefore, in this case, that the justice meant to certify that he verily believed the assured had sustained damage or loss by the destruction of the dwelling-house insured, to the amount of twenty-five hundred dollars, or any other specific sum, as stated in Tyler's affidavit or certificate, I should have no difficulty in concurring in opinion with the court below that the preliminary proofs were sufficient, and that the judgment should be affirmed. But when I look at the peculiar terms in which the justice's certificate is framed, and then advert to the fact that the whole of the buildings insured, and not insured, together with the land itself, were sold but a few months before for a much less sum, I cannot bring my mind to the conclusion that Groves meant to certify that he believed Tyler's loss upon the dwelling-house alone, which was the only property included in the policy, was worth about $2,500, as stated in the affidavit of the latter. The condition of the policy is not that the magistrate shall state that he believes the assured has sustained damage or loss to the amount mentioned in the affidavit of the latter. The meaning unquestionably is, that the certificate shall specify the sum which the magistrate believes the assured has sustained by the destruction or partial destruction of the subject insured. If he believed, therefore, that the loss by the burning of the house, exclusive of the furniture, was less than the sum at which the assured had estimated it in his affidavit, it would have been a compliance with the terms of the policy if he had stated what he believed the real amount of that loss to be, although it was not, in his opinion, so great as that at which Tyler himself had stated it. Although the amount *therein mentioned*, in the conditions annexed to the policy, evidently means the amount mentioned in the certificate of the magistrate, I have no doubt the certificate would be sufficient if the fair construction of it was, that he believed that he had sustained damage or loss by the destruction of the subject of insurance to the amount

of the United States,[1] to a recovery, that the usual preliminary proofs were not furnished according to the requirement of one of the articles of the conditions annexed to the policies of the company. These proofs were required to be furnished in a reasonable time after the happening of the loss. The fire occurred on the 22d of December, 1844, and the preliminary proofs were not furnished till the 24th of November, 1845. This, the court considered, was doubtless too late, and the objection would have been fatal to the right of the complainant, if the production of these proofs were essential to a recovery. But the answer was, that the ground upon which the company originally placed their resistance to the payment of the loss, operated as a waiver of the necessity for the production of the preliminary proofs; and that was, that no obligation to insure the loss was ever entered into by the company, the contract being incomplete[2] at the time it occurred. On this ground, they refused to issue the policy, which would have imposed upon the assured a strict compliance with its conditions; or to recognize any obligations arising out of the arrangement between him and their agent. The objection went to the foundation of the claim, which, in connection with a refusal to issue the policy, superseded the necessity of producing those proofs; as the production would have been but an idle ceremony on the part of the assured, in the further prosecution of his right; there was no reason for producing them after the company had denied the contract, and refused the policy. "It

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specified by the assured in his affidavit annexed, as that in effect would be a specification of the amount in the certificate of the magistrate by reference to the affidavit to which it was annexed. But as I am unable to give such a construction to the language of the certificate in this case, I am compelled, upon this point alone, to vote for a reversal of the judgment of the court below." 16 Wend. 402–404.

[1] Taylor *v.* Merchants' Ins. Co. 9 How. (U. S.) R. 390; and cited *ante*, § 48.

[2] See *ante*, Chap. III.

is manifest," said Nelson, J., "on an examination of the two cases, that the doctrine of the first on this point of waiver was virtually overruled, for, if maintained in the second, it would have upheld the ruling at the circuit in the first."

§ 247. In the above case, the case of the Columbian Insurance Company *v.* Lawrence, in the same court,[1] was referred to. An objection was there taken on the trial to the sufficiency of the preliminary proofs, on the ground that the certificate of the magistrate was not in conformity with one of the articles of the conditions. The particular objection had not been taken by the company when the proofs were furnished, although several others had been as to their liability; and the court left to the jury the question (among others) whether the company had not thereby waived the objection to the sufficiency of the certificate. The plaintiff recovered; and on a motion for a new trial, among other grounds assigned for granting it, was this instruction of the court. It was held, that there was no evidence in the case from which the jury could properly infer a waiver. The preliminary proof had been properly presented to the company on the 16th of February, 1824, soon after the loss. The suit was discontinued, and a new certificate was procured from the magistrate correcting the defects in the first, and furnished to the company on the 14th of February, 1829, five years after the first had been delivered. A new suit was brought, and on the second trial, the objection was taken that the certificate had not been produced within a reasonable time after the loss; but the court held otherwise, placing their decision upon the ground, that the *laches* were not properly imputable to the assured, but to the company, on account of their neglect to give notice of the defect when the first certificate was presented, and of the mistaken confidence which the party had placed in them. The court say,[2] "If the company

[1] Columbian Ins. Co. *v.* Lawrence, 2 Peters (U. S.) R. 2.

[2] 10 Peters (U. S.) R. 507.

had contemplated the objection, it would have been but ordinary fair dealing to have apprised the plaintiff of it; for it was then obvious, that the defect might have been immediately supplied; as it was, the company, unintentionally, it may be, by their silence, misled him."

§ 248. The principle of waiver was recognized in Heath *v.* Franklin Insurance Company,[1] in which the notice was given on very general terms; conveying no intelligence as to the amount of damages; containing no statement of the particular circumstances connected with the cause of the loss; and making no demand of any specific sum of money as an indemnity. The court held the sufficiency of this notice was not to be determined solely by general principles applicable to other policies, but in part also upon the peculiar provisions of the policy in question, or the stipulation which it contains regulating this subject. The court say: "The provisions relative to notices of loss, are very general, and are not wholly contained in the following clauses: 'In case of any loss, the same is to be paid without any deduction, in ninety days after proof thereof. And the assured agrees, in the case of any loss or damage, the said company shall have the right to replace the articles lost or damaged, with others of the same kind and equal goodness, at any time after notice of the loss.' It would have been entirely competent for the company to have required a distinct specification of the damage claimed by reason of the loss, or other precise and minute particulars, but they have not done so." And the court reason, that according to the principle referred to, *when underwriters make objection to a deficiency in the preliminary proof, or to the notice given, but put their denial of liability upon other grounds, such conduct is a waiver of their objection of a defective notice.*

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[1] Heath *v.* Franklin Ins. Co., Cush. (Mass.) R.

CHAPTER XI.

OF THE ADJUSTMENT AND SETTLEMENT OF LOSS, AND OF REBUILDING.

§ 249. Fire Insurance, as was suggested in an early portion of the work,[1] is a prototype of marine insurance; and it is true that a number of very important questions arising under both fire and life insurances, are determined by analogous decisions of the courts in expounding the general law which govern marine policies, — the obligation, for instance, of the assured, to communicate material facts, the necessity of his having an interest, &c., have very naturally been imparted to fire policies.[2] But the difference between the mode of *adjustment* and *satisfaction* in the contract of marine insurance and that of fire insurance, in the event of loss, (as has been stated by a very learned Judge, whose attention through a long course of judicial duty, has often been directed to both branches of insurance law,) is distinct and obvious. The following is his language: "In fire policies, the assured recovers the whole loss, if within the amount insured, without regard to the proportion between the amount insured, or the value of the property at risk. Whereas in marine policies, the insurer pays only such a proportion of the actual loss as the sum insured bears to the value of the property at risk. For instance, on fire policies, if the sum insured be $2,000, on property worth $10,000, and the assured sustains an actual loss on the whole, he recovers the whole $2,000. But in a

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[1] See *ante*, Intr. § 27, and § 12 of the Treat.

[2] See Dowd. on Life and Fire Ins. 13.

like case in a marine policy, he would recover one fifth only, or $400; being the proportion which the sum insured bears to the value at risk; the assured himself bearing the other four fifths of the risk. The result is, that every settlement of a loss by fire is in the nature of the adjustment of a partial loss, although it may amount to the whole sum insured. It is the payment of the whole actual loss sustained on the whole property at risk, not exceeding the sum insured, without regard to any apportionment between the sum insured and the property at risk, or to any abandonment or technical or constructive total loss, or salvage." [1]

§ 250. Though settlements of losses by fire are by custom made on the principle of *particular average*, and the estimated loss is paid without abandonment of what has been saved, yet there may be a *general average*, for a sacrifice made by the assured for the common good, in case of necessity, such being analogous to the law of contribution in the case of co-sureties.[2]

§ 251. If, for instance, a fire happen in the neighborhood of the assured, and he, with the approbation of the underwriters, procures blankets and spreads them on the outside of his building, whereby the building and its contents are preserved, and the blankets are rendered worthless, the assured may then claim, but only claim, on the ground of a sacrifice made by him for the preservation of the property endangered by the fire, and for a *proportion* of which sacrifice, he is equitably, if not legally, entitled to recover. If it be contended, that such a case is not proper for contribution, it being customary on fire policies to pay the whole loss, it may be replied that, as such

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[1] Per Shaw, Ch. J., in Trull *v.* Roxbury Mutual Fire Ins. Co. 3 Cush. (Mass.) R. 263; in which the learned judge refers to Liscom *v.* Boston Mutual Fire Ins. Co. 9 Met. (Mass.) 205, and Holmes *v.* Charlestown Mutual Fire Ins. Co.

[2] 3 Kent. Comm. 375; and see as to the general principle of co-suretyship and as to the extent of its application, *ante*, 88.

claim is not within the contract, it is reasonable that a proportion of the sacrifice be made for the common benefit. But it will not do to take so wide range in the application of the principle of contribution, that the two parties are not the only parties who ought to contribute, on the ground that all the property in the neighborhood was protected by the expenses in question. Buildings at a remote distance might have been protected, and to draw the line would be an impossibility.[1]

§ 252. In England, in consequence of the numerous fires which had taken place in the agricultural and manufacturing districts by the acts of incendiaries, the offices in general have been under the necessity of adopting an *average clause* in their policies upon farming stock, by which where a person insures property collectively of larger value than the amount insured, he shall only recover in the proportion which the whole value bears to the part insured.[2] For example, if having property worth 10,000*l.*, he insures it only for 1,000*l.*, in case of a fire producing loss or damage to the amount of 1,000*l.*, he will recover only 100*l.* As an encouragement to the assured to use active diligence in the preservation of property after a fire has broken out, it frequently forms a part of the proposals that the office will repay all real and actual expenses incurred in the *removal of the goods* in case of fire. Ellis on Fire and Life Ins. 16, 17. That author truly adds, — "It is indeed difficult to conceive any conduct more nearly approaching to fraud, if not partaking of it, than for the assured to abstain himself, or prevent others, from using every possible means to extinguish the fire or save the property from destruction." [3]

§ 253. The distinction there is between a *valued* and an *open* policy in determining the amount for which the underwriters are liable to pay in case of loss, has already been adverted to;

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[1] Wells *v.* Boston Ins. Co. 6 Pick. (Mass.) R. 182.

[2] See Appx. 1.

[3] See on this particular subject, *ante*, §§ 116 and 127, *et seq.*

and it appears, that it has long been considered in marine insurance, that the former is one in which a value has been set upon the property or interest insured, and inserted in the policy; the value thus agreed on being in the nature of liquidated damages, and so gives no occasion for any further proof of damages. The latter, or an *open* policy, is one in which the amount of interest is not fixed by the policy, but is left to be ascertained in the event of a loss.[1] The valuation in a policy is conclusive upon the underwriters, when there is no suggestion of fraud or imposition;[2] but, as loss by fire is not generally a total loss, the valuation in the policy is rather the fixing of a *maximum* beyond which the underwriters are not to be liable, than a conclusive ascertainment of the value. Still a policy against fire *may* be a valued one by the terms of the contract,[3] and the doctrine in relation thereto is the same as that in marine insurance, which is, that where the *subject-matter* is clearly set forth in an instrument, other expressions are to be taken in reference to that subject-matter, which, in case of doubt or ambiguity, is to govern in ascertaining the meaning of particular expressions.[4] Policies on profits always are, and necessarily must be, valued.[5]

§ 254. As the rules applicable to marine insurance so far *as the analogy* between that and fire insurance will hold, ought to, and do, govern; according to those rules, a fire policy was held to be a valued one in the following case: Among the articles insured, there were 380 kegs manufactured tobacco, worth $9,600; this was the rate at which the tobacco was estimated, in making up the $20,000, the amount of the insurance. The premium was paid according to this valuation,

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[1] See *ante*, Intr. § 5, and Treat. § 11.

[2] Kane *v.* Commercial Ins. Co. 8 Johns. (N. Y.) R. 229–236.

[3] 3 Kent. Comm. 375.

[4] Marsh. on Ins. 164.

[5] Mumford *v.* Hallett, 1 Johns. (N. Y.) R. 433.

and the 157 kegs lost were expressly stated *to be of the same kind and quality* as the whole 380 kegs; so that there was an infallible rule to estimate the several and distinct value of each keg of tobacco. There being no pretence that there had been any fraud or over valuation, it was held by the court to be a valued policy.[1]

§ 255. It is a wise and salutary provision of the legislature, and one which serves alike for the protection of the stockholders and the individual insured, that mutual insurance companies may insure upon a building to any amount, not exceeding *two thirds* or *three fourths* of the value thereof. The design is to prevent fraud and negligence, by making it an object with the owner to guard his property from exposure to fire, and to preserve it from destruction when the calamity comes; and by this increased security, to induce honest persons, who are men of property, to become members of such companies, and able and willing to contribute in the event of loss.[2] A valuation, deliberately and honestly fixed by agreement, a valuation by which the premium and assessments to be paid by the assured are fixed, as well as the amount to be paid by

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[1] Harris *v.* Eagle Fire Ins. Co. 5 Johns. (N. Y.) R. 368, the court relying upon the authority of Lewis *v.* Racker, 2 Burr. R. 1167 — Lord Mansfield. That there may be a valued policy of fire insurance, was admitted by Jones, C. J., in Lawrent *v.* Chatham Fire Ins. Co. 1 Hall, (N. Y.) R. 41; Borden *v.* Hingham Fire Ins. Co. 18 Pick. (Mass.) R. 523, and cited *ante*, § 190, n. Profits may be insured by a fire policy if they were insured as such. Niblo *v.* North American Ins. Co. 1 Sand. (N. Y.) Sup. Co. R. 557, Sandford, J., and see *ante*, § 105, and Chap. IV., "Of the Interest of the Assured." Howell *v.* Cincinnati Ins. Co. 7 Ham. (Ohio) R. 398; and see Liscom *v.* Boston Mutual Fire Ins. Co. 9 Met. (Mass.) R. 205; Post *v.* Hampshire Mutual Fire Ins. Co. 12 Met. (Mass.) R. 555. In France, valued policies against fire are rejected; and in Wallace *v.* Insurance Company, 4 Mill. (Louis.) R. 289, the expediency and even the legality of valued policies on fire, seemed to be questioned. See 3 Kent. Comm. 375.

[2] Per Hubbard, J., in Holmes *v.* Charlestown Mutual Fire Ins. Co. 10 Met. (Mass.) R. 211, 215.

the company in case of loss, is the best evidence of the actual value.[1]

§ 256. Under such a statutory regulation, it will not answer to take the sum insured as furnishing the evidence of the value of the property by adding *one third* to it; because, if this would be sufficient, the valuation would become matter of form only, and the contract would be in fact regulated, not by the value of the property, but by the sum insured; a species of insurance which it was not the intent of the legislature to countenance in granting such acts of incorporation. An application for insurance against loss of a meeting-house and its fixtures, by fire, was made to a mutual fire insurance company that could not, by statute and its own by-laws, insure upon any building an amount exceeding three fourths of the value thereof; and in the application, the value of the building was stated to be *four thousand dollars*. The company executed a policy insuring, under the conditions and limitations expressed in its own by-laws and in the statute regulating mutual fire insurance companies, *three thousand five hundred dollars* on the meeting-house and fixtures. The house was destroyed by fire, and the company paid *three* thousand dollars to the assured, towards the loss. In a suit on the policy to recover the balance of *five hundred dollars*, it was held, that the assured could not recover; that the statement of the value of the house and fixtures, in the application for insurance, was conclusive on the assured, so that they could not be permitted to show that the property insured, at the time of the insurance, was of such a value that *three thousand five hundred dollars* did not exceed three fourths thereof. By the court, — "The value being fixed at *four thousand dollars*, the contract does not, by law, cover more than three fourths of that sum; for it is admitted, and very properly that the words 'and the fixtures

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[1] Fuller *v.* Boston Mutual Fire Ins. Co. 4 Met. (Mass.) R. 206. It is in the highest sense, a valuation by mutual agreement. Ibid.

in the same' do not constitute the subject of a separate contract. The fixtures are a part of the building itself, and are included in the estimates of its value. They are like the term 'appurtenances' when applied to the insurance on a vessel."[1] The valuation, if made in good faith, is binding on both parties. "The converse of this proposition has arisen in two cases of fire policies, and in them it is directly settled that companies were concluded on the question of over-valuation; the same not being fraudulent. If then underwriters are precluded from going into evidence to show an over-valuation when no fraud is alleged, owners must in like manner be concluded when the property is undervalued."[2]

§ 257. By the charter of the Hampshire Mutual Fire Insurance Company, the company cannot insure to an amount exceeding *three fourths* of the value of the property insured, and they, in the rules and regulations adopted by them, reserved a right to have a valuation made anew, in case of loss, without regard to the valuation in the policy. The insurance in that case was *five hundred dollars* on the house, which was valued at *seven hundred and fifty dollars*, and *five hundred dollars* on furniture, which was not valued. The jury found the value of the house to be *six hundred dollars*, and of the furniture *four hundred dollars;* and it was conceded by the company, that the actual loss, on each subject, exceeded the amount insured. The court were, therefore, of opinion, that the plaintiff was entitled to recover three fourths of these two sums, to wit, *four hundred and fifty dollars* on the house, and *three hundred dollars* on the furniture, with interest.[3]

§ 258. One of the principal objections, in a case that arose

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[1] Borden *v.* Hingham Mutual Fire Ins. Co. 18 Pick. (Mass.) R. 523; Fuller *v.* Boston Mutual Fire Ins. Co. 4 Met. (Mass.) R. 206.

[2] Holmes *v.* Charlestown Mutual Fire Ins. Co. 10 Met. (Mass.) R. 241, and *ub. sup.*

[3] Post *v.* Hampshire Mutual Fire Ins. Co. 12 Met. (Mass.) R. 551.

upon a policy made by a mutual insurance company that had no authority to insure over *three fourths* of the value of the buildings, was, that the company were a corporation; and that a corporation can only act within the scope of the authority conferred upon them; and that, by their act of incorporation, the company could only insure three fourths of the value of the property; and if they can show that a contract, in its terms, proposes to bind them to a responsibility for a greater amount, they may show it in defence, and reduce the amount to that for which alone they can make themselves liable. But the court were of opinion, that this argument did not shake the position; that a valuation fairly and deliberately made, was binding on them; and that, like all other trading or negotiating corporations, being invested with the power to make a particular class of contracts, they are invested with all the incidental powers necessary to carry into effect the objects and purposes for which the corporation was created. In giving to an incorporated company power to insure a certain proportion of the value of buildings, the legislature necessarily clothed them with the power at some time and in some mode, to determine such value, or to enter into suitable and proper arrangements for fixing it. Such valuation by the appraisement of indifferent men, or such adjustment after a loss, would always be open to the same objection.[1]

§ 259. Preliminary proofs, although admissible as evidence, in an action upon the policy, are not evidence in the question of the amount of damages, unless they are made so by the terms of the policy. The conditions attached to a policy contained this clause: "Payment of losses will be made within three months after the loss shall have been ascertained, and the statements made as above." This contract, the court held, did not render the preliminary proofs admissible as to the amount of damage. The defendants, the court held, had a

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[1] Fuller *v.* Boston Mutual Fire Ins. Co. 4 Met. (Mass.) R. 206.

right to require them to aid in a mutual adjustment of the matter, but it was not stipulated that, in case of litigation, they should be evidence generally on the trial.[1]

§ 260. When it is made a condition of a policy of insurance, that in case of loss, "the assured shall, if required, submit to an examination under oath by the agent of the company, and answer all questions touching their knowledge of any thing relating to such loss or damage, or to their claim therefor, and subscribe such examination, the same being reduced to writing;" if such examination be once made and completed, the assured cannot be required by the company to submit to a further examination *under oath* afterwards; although, at the time of making the oath, he may have assented to a further and a future examination. Thus, the fact that the assured, in his affidavit, estimated the value of certain goods which were consumed by fire, at $2800, and the jury returned a verdict of $1853 only, is not such evidence of fraud and false swearing as will justify the granting of a new trial, when the jury have been instructed, that if they found that there was false swearing on the part of the assured, he is not entitled to recover. The assured may err in opinion without being guilty of any thing like fraud.[2]

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[1] Sexton *v.* Montgomery County Mutual Ins. Co. 9 Barb. (N. Y.) Sup. Co. R. 191; Hone *v.* Mutual Safety Fire Ins. Co. 1 Sand. (N. Y.) Sup. Co. R. 137.

[2] Moore *v.* Protection Ins. Co. 16 Shep. (Me.) R. 97. The court, in giving judgment in this case, refer to the case of Levy *v.* Baillie, (7 Bing. R. 349, as in some respects being analogous. It was an action in the English Court of Common Pleas on a fire insurance policy, which contained, among others, the following condition: "Persons insuring with the society, sustaining any loss or damage by fire, are required to give immediate notice thereof to the principal office of the society; and are also to deliver in as full an account of their loss or damage as the nature of the case will admit of, and to make proof of the same by their affidavit or affirmation, and produce such other evidence as the directors of the society may reasonably require;

§ 261. What is to be the rule of adjustment and settlement between the underwriter and the assured, in a case where premises and merchandise are destroyed by gunpowder, by city authority, (as in cases before referred to,[1]) with the view of arresting the ravage of a conflagration, and the owners, who were insured, have claimed and obtained a verdict, through a jury, against the corporation; although the amount of it is less than the insurance, and the absolute loss? Vice-Chancellor Edwards, of New York, held that the owners could not resort

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and until such affidavit or affirmation, account and evidence be produced, the amount of such loss, or any part thereof, shall not be payable or recoverable. And if there be fraud in the claim made, or false swearing in support thereof, the claimant shall forfeit all benefit under such policy." The plaintiff was an upholsterer, and carried on business in a small house, and the insurance to the amount of 1000*l.*, was effected on his stock in trade, the 22d of November, 1827. The premises were burnt on the night of the 14th of February, 1830. The plaintiff made affidavit that, in consequence of the fire, he had sustained a loss of stock to the amount of 1085*l.*: viz., 85*l.* for goods which were injured in the process of removal, and 1000*l.* for goods which had been abstracted by the crowd assembled on the occasion, and had never been recovered. The defendants contended that this claim was fraudulent, and called witnesses to show that it was impossible for goods so numerous and bulky to have been carried off undiscovered. These witnesses stated that police-men were on the spot as soon as the fire broke out; that a cordon was established round the premises almost immediately; that the fire was over in about two hours; and that no article of size could have been carried away. The plaintiff's witnesses denied that the blockade had been so effectual, and the Chief Justice (Tindal) left it for the jury to say, whether the plaintiff had made a fraudulent demand or not. The jury having found a verdict for the plaintiff with 500*l.* damages, a rule *nisi* was obtained for a new trial, on the ground that the finding of 500*l.* damages, instead of the whole amount sworn to by the plaintiff, amounted in effect to a verdict for the defendants, under the condition which avoided the policy, if there were any fraud or false swearing in the plaintiff's claim. The court sustained the argument on the other side, that the finding of the jury was not necessarily a proof that there had been fraud in the plaintiff's claim, as he might by mistake have estimated the goods lost at more than their value.

[1] See *ante*, § 118.

to the underwriters for a balance, and that the jury must be presumed to have passed on the whole amount.[1] But, on an appeal from that decision,[2] Chancellor Walworth held, that the Vice-Chancellor erred in supposing the verdict of a jury upon the assessment was conclusive evidence between the parties, as to the actual amount of the loss which the petitioners had sustained; although as between the petitioners and the city corporation, it was conclusive. And as the insurance company, said he, could have no claim against the city of New York, except through the petitioners, and as being subrogated,[3] it would be conclusive as between the corporation and that company. Chancellor Walworth then proceeds as follows: "The decision of the Supreme Court in the case of the City Fire Insurance Company *v.* Corlies,[4] shows that the insurers were liable to the assured to the extent of their policies, notwithstanding the blowing up of their buildings. The application for an assessment against the corporation was, therefore, for the benefit of the insurers to the extent of the insurance, and for the benefit of the petitioners for the residue of the loss. And if the jury without any fault on the part of the assured, should refuse to give the whole amount of the loss, either because they thought some part of the property would undoubtedly have been destroyed by the fire, if the buildings had not been blown up, or for any other cause, there is no principle which can make that decision conclusive as to the actual extent of the loss as between the insurer and the assured. The fact that a part of the property would unquestionably have been lost by the fire, if the building had not been blown up, would be a good reason for not including that amount in the assessment against the city. But it would be no reason for excusing the insurers from bearing their proportion of that loss which was covered by the policy. Again;

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[1] Pentz *v.* Etna Fire Ins. Co. 3 Ed. (N. Y.) Ch. R. 341.

[2] 9 Paige, (N. Y.) Ch. R. 568. [3] See *ante*, § 66, p. 109, n. 2.

[4] City Fire Ins. Co. *v.* Corlies, 21 Wend. (N. Y.) R. 367.

the proceeding against the corporation being for the benefit of the insurers as well as the assured, the latter were entitled to a deduction from the amount recovered from the city corporation on account of the necessary costs and expenses of litigating that assessment through all the courts; and the loss of interest, if any, which had been sustained without any fault on the part of the petitioners. The claim against the underwriters must, therefore, be adjusted by ascertaining the whole extent of the loss at the cash value of the buildings and goods at the time of the destruction thereof, including the interest thereon until the time when the money was recovered under the assessment, and then deducting therefrom the amount received as the proceeds of the assessment; and charging the insurers with a proportionate share of the costs and counsel fees of that litigation in proportion to the benefit it was to them in limiting their liability under the policies. But in such a manner as in no event to charge the insurers with more than the amount of the two policies, and the interest thereon from the 25th of May, 1836; when the amount of the loss became due and payable by the underwriters. If the receivers and petitioners cannot agree upon an adjustment of these principles, the referees must review their report and ascertain the amount due, and report the same to the Vice-Chancellor; to the end that a proper order may be made thereon for the payment of the distributive share of the petitioners, out of the funds in the hands of the receivers. No costs are allowed to either party on this appeal; and the proceedings are to be remitted to the Vice-Chancellor."

§ 262. In the adjustment of the amount of loss or damage to the assured by fire, it is sometimes, as we have seen, important to consider carefully what property is designated, embraced or covered by the policy;[1] and likewise the nature and

[1] See *ante*, § 96 – 109. A policy on an unfinished house does not cover wood-work prepared for such house, and deposited in an adjoining one which

extent of the interest of the assured in the property designated.[1] In respect to the latter, the attention of the reader is invited to a very important and interesting case. In Laurent *v.* Chatham Fire Insurance Company,[2] before cited,[3] the defendants had insured $800 on a building, which was destroyed by fire. On the trial, the defendants proved that the plaintiff was the lessee of the land on which the building stood, and although he had erected it himself, and was entitled to remove it at the end of his term, the lease had only seventeen days to run when the fire occurred. The value of the building, as it stood, was $1000; but if it were necessary to remove it from the lot demised, it was not worth, for that purpose, more than $200. The judgment of the court was, that the value of the building, as it stood, was the measure of damages, and not any estimate of what it might prove to be worth to the assured, under the circumstances in which it was placed. The argument of Chief Justice Jones, in this case, is elaborate, and satisfactory to show that, as it is the tenement upon which the insurance was made, so the actual value of the tenement, as a building, is the loss of the assured, on its destruction by fire; that however unproductive the property may be, or however great may be the extent of the revenue derived from it, the measure of indemnity, in case of loss, is simply its value as a building.[4]

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has been likewise insured. Ellmaker *v.* Franklin Ins. Co. 5 Barr, (Penn.) R. 183.

[1] See *ante*, Chap. IV.

[2] Laurent *v.* Chatham Fire Ins. Co. 1 Hall, (N. Y.) R. 41.

[3] See *ante*, § 65.

[4] Per Sandford, J., in Niblo *v.* North American Ins. Co. 1 Sand. (N. Y.) Sup. Co. R. on p. 558. "Whether," said Chief Justice Jones, "there may not be incidents and special circumstances so intimately connected with the premises, or so permanently attached to them as to affect the intrinsic value, or the insurable interest of the party who effects the insurance upon them, I am not prepared to say; and it is not material to the question before us to inquire, for this clearly is not such a case. In this case the tenement belonged exclusively to the assured, and the lease of the lot upon which it

§ 263. In a case of re-insurance, (the nature of which contract has already been attentively considered,[1]) it binds the re-insurer to pay to the re-assured the whole amount of loss sustained in respect of the subject insured to the extent for which he is a re-insurer. The defendants, in Hone *v.* Mutual Safety Insurance Company,[2] entered into a contract with a mutual corporation by which they agree to pay to that corpo-

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stood had *fifteen* days to run, and was moreover renewable. The true and actual value of it exceeded the sum insured upon it, and the loss of it by fire was absolute and total, and took place within the term for which it was insured. The sole ground of objection to the right to recover the full amount of the insurance is, that the lease was about expiring, and had not been renewed, and it did not appear that the notice required by the lease to entitle the holder to a renewal had been given, and on these grounds the recovery is sought to be limited to the value of the building as a tenement to be removed from the premises. But if that contingency could in any supposable case be brought into the calculation, and suffered to reduce the insurable interest, or the claim to indemnity for the actual loss of the building by the fire, (which, if I am right in my conclusions on the point, would be wholly inadmissible,) still it would not follow that in this case such deduction could be made, for it is not reduced to a certainty that the lease would not have been renewed. Application may have been made to the agents for a renewal; or if the time limited for the renewal as a matter of right had been suffered to elapse, the lessee might, within the remaining *fifteen* days of the subsisting term, have made an arrangement with the landlord for the continuance of the lease, or he might have sold the tenement to a successor or to the landlord; or the tenement, which, from its construction, not having any foundation or fixture attaching it to the soil, was capable of removal, might have been removed to one of the vacant lots in its immediate vicinity, of which it appears in proof there were several. In any one of these contingencies the tenement, which has been found to have been worth $1000, might well have produced the owner of it the sum of $800 insured upon it by the defendants. The plaintiff, by the total destruction of it by the fire, lost the means of availing himself of the sale or the removal of it, and may have been compelled, by the loss of the building, to relinquish the right reserved to him to renew and continue the lease." It was not reduced to a certainty that the lease would not have been renewed.

[1] See *ante*, § 83, *et seq.*

[2] Hone *v.* Mutual Safety Ins. Co. 1 Sand. (N. Y.) Sup. Co. R. 137.

ration such loss or damage by fire, not exceeding ten thousand dollars, as might occur to the merchandise of H. & V., within one year from May 4th, 1845. In July, in that year, more than ten thousand dollars of the merchandise, so insured, was destroyed by fire. The requisite proofs of the loss were made to the defendants, and were satisfactory; and the court considered, that it would seem to follow that the defendants should pay the ten thousand dollars, according "to what was undeniably the clear, distinct, and unequivocal terms of their agreement;" and this, although the defendants invoked, in their behalf, *an usage* among the insurers of the city of New York, which, if valid, greatly modified the effect of the policy of re-insurance.[1]

§ 264. It has been seen that factors or commission merchants who hold goods on commission, are entitled to recover to the full extent of their value, the amount payable for the loss.[2] The loss or damage by fire under consignment, is to be estimated according to the true and actual value of the property, *at the time the loss* happens. The reimbursement of the advances of the consignee, and the payment of the commission he would have earned by the sale of the goods, would not satisfy the terms of the contract of insurance, as it would not be making good the loss of the assured. If insurance on goods held on commission be intended to be confined to the advances made by the consignee, the interest insured should be so expressed; it should be declared to be an insurance on the advances and commissions of the consignee, or *his* property in the goods, and the promise would have been to pay the loss or damage only to the extent of that interest.[3]

§ 265. In Hoffman *v.* Marine and Fire Insurance Company,[4]

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[1] Ibid. as to doctrine of usage.

[2] See *ante*, § 73, *et seq.*

[3] De Forest *v.* Fulton Fire Ins. Co. 1 Hall, (N. Y.) R. 116, and cited in full, *ante*, § 75.

[4] Hoffman *v.* Western Marine and Fire Ins. Co. 1 Louis. Am. R. 216.

where it appeared that the goods insured against were destroyed by fire, it was held, by the Supreme Court of Louisiana, that the insurer was bound to pay their value *at the time of the loss;* that if damaged only, he was bound for the difference between their value in their sound and damaged condition; that where the goods are so much damaged as not to be salable in the ordinary mode, a fair sale at auction, made by the assured, after reasonable notice to the insurers, or with their knowledge, may be considered by the jury in estimating the damage, and in ascertaining the amount of indemnity; but the price for which such damaged goods were sold at auction by the assured, without notice to, or knowledge by the insurers, of the sale, is not sufficient evidence of the value of the goods in their damaged condition.

§ 266. It has been shown that common-carriers have an insurable interest in the goods delivered to them for transportation.[1] Where the insurance was effected by a carrier for twelve months, upon goods on board a certain number of canal boats, and the insurance was agreed to be 12,000*l.* on goods, as interest might appear thereafter; and the claim on the policy warranted not to exceed 1000*l.* per cent.; and 5000*l.* only were to be covered by the policy in any one boat, on any one trip; and the premium was 30*s.* per cent.; it was held, that upon the loss of goods on board one of the boats, the assured was entitled to recover the proportion of such loss which 12,000*l.* bore to the whole value of the goods afloat at the time; and not the proportion of 12,000*l.* to the whole amount carried during the year.[2]

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[1] See *ante*, § 77, 78.

[2] Crowley *v.* Cohen, 3 B. & Adol. R. 478, Littledale, J., said, "Goods in the custody of carriers, are constantly described, as their goods in indictments and declarations in trespass. The plaintiffs here were liable in particular cases, for the loss of the goods they carried, and had a special property in them on that account. As to the argument that this policy was exhausted when goods had been carried in all, or in each of the boats to the

§ 267. As has already been made to appear, the underwriter is liable only for the *immediate* consequences of fire or burning; and in the adjustment of a loss by fire, *remote* consequences are of no account.[1] It may be asserted as unquestionable, that an insurance against loss or damage by fire on a building *simply*, and its injury or destruction by the peril insured against, the assured cannot recover for his loss occasioned by the interruption or destruction of his *business* carried on in such building, nor for any *gains* or *profits* which were morally certain to enure to him, if it had remained uninjured to the expiration of the policy; for although *profits* of trade or business, are an insurable interest, still they must be insured separately.[2] A policy, for instance, insured 1000*l.* on an "inn and offices;" and the premises being injured by fire, the insurer reinstated them pursuant to the policy. But the assured claimed to recover for the rent paid in the mean time, the hire of other houses, &c., while the "Inn" was being repaired and the loss or damage sustained by him by reason of various persons declining to go to the "Inn" while it was undergoing such repairs. But the court held, that if he would recover such profits as these, he must insure them *as* profits.[3]

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amount of 12,000*l.*, I think that cannot have been the intention, where a policy was effected on thirty boats continually going on this canal, and each of which might convey goods to that amount in a time far short of a year. It appears to me, that the contract was in effect equivalent to a fresh insurance taking place at the time when each vessel started, and governing all that were then afloat; only, instead of a renewed insurance, the object was obtained by a continuing policy."

[1] See *ante*, § 111 – 127; Wells *v.* Boston Ins. Co. 6 Pick. (Mass.) R. 182.

[2] Niblo *v.* North American Ins. Co. 1 Sand. (N. Y.) Sup. Co. R. 551. The point urged, said the court, "is plausible, but it is not to be disguised, that it leads to the admission of proofs of gains and profits interrupted and cut off, in every case where the tenement insured is occupied for business purposes, and the injury to the building itself, or to the interest of the assured therein, is less than the sum insured."

[3] Wright *v.* Sun Fire Office, 2 Nev. & Mann. R. 819, and 1 Adol. & Ell. R. 621; And see *ante*, § 105.

§ 268. Reinstatement of the Premises, or Rebuilding. By many, and perhaps the most, of fire policies, the underwriters reserve to themselves an option of paying the money, or expending it in the restoration of the property, replacing the articles, or in rebuilding within a specified time, in a manner to restore the property to as good a condition as it was before the fire.[1] An option to rebuild is given when, by the terms of the policy, liberty is given to begin to build or repair within six days after the fire happens.[2]

§ 269. Suppose that when an insured building has been totally destroyed by fire, and a new one has been erected by

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[1] Ellis on Fire and Life Ins. 19; Dowd. on Life and Fire Ins. 89, 109; Beaumont on Life and Fire Ins. 57. By the statute 14 Geo. 3, c. 78, s. 83, entitled an "Act for the further and better regulating of Buildings and Party-Walls, &c., within the Weekly Bills of Mortality," &c., it is enacted, that "it may be lawful for the directors and governors of the several insurance offices, and they are hereby authorized and required, upon the request of any person, &c., interested in, or entitled unto any house or houses or other buildings which may hereafter be burned down, demolished, damaged by fire, or upon any grounds of suspicion that the owner, &c., occupier, &c., or any other person, &c., who shall have insured such house or other building, have been guilty of fraud, or of wilfully setting their house or other building on fire, to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating, or repairing such house or houses or other buildings so burnt down, &c., unless the party, &c., claiming such insurance money shall, within sixty days next after his, &c., claim is adjusted, give sufficient security to the governors or directors of the insurance office where such house or houses or other buildings are insured, that the same insurance money shall be in that time settled and disposed of to and amongst all the contending parties, to the satisfaction and approbation of such governors and directors." Ellis on Fire and Life Ins. 19.

[2] Sadlers Company *v.* Badcock, 2 Atk. Ch. R. 534. "In estimating the damages, the jury are to be regulated by the extent of the loss by fire; the only loss or danger within the policy is that which happens by fire. This the company bound themselves to make *good* by paying it, or by *restoring the property* within a specified time to as good a condition as it was in before the fire." Per Rogers, J., in Ellmaker *v.* Franklin Ins. Co. 5 Barr, (Penn.) R. 183.

the assured, is there any deduction to be made from the expense of rebuilding, if the new one is more durable than the old one would have been, and for the same purposes, more valuable? The rule as laid down by Professor Greenleaf,[1] is, that the actual loss is to be ascertained by the expense of restoring the property without any deduction for the difference of value between the new and old materials; the only adjudicated case in point he cites, that has any direct bearing on the question, being Vance *v.* Foster,[2] in which Baron Pennefather laid down a very different rule. He says,[3] that the jury are to say what state of repair the machinery was in, what it would cost to replace it by new machinery, and how much better (if at all) the mill in which the machinery was placed would be with the new machinery, than it was at the time of the fire; and the difference is to be deducted from the entire expense of placing there such new machinery. "This rule," say the Supreme Court of Massachusetts,[4] "in all cases where the cost of repairs is one of the elements by which the jury are to estimate the actual loss, seems to be founded on the principles of justice, as it will give to the assured a full indemnity, and no more; to which he is entitled by the contract." But, say the court, "By the rule contended for by the plaintiff's counsel, the assured in most cases would recover more than an indemnity; and much more, when the building insured is dilapidated and much out of repair. Such rule is not supported by any principle of justice, nor by the authority of any adjudged case. It is founded on an erroneous construction of the contract. It supposes that the insurers are bound to repair the building, or to pay the expenses of the repairs. But no such obligation is imposed on them by the policy. They have the privilege to make the requisite repairs,

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[1] 2 Greenl. Ev. 407.

[2] Vance *v.* Foster, 1 Irish Circuit Cases, 51.

[3] As is reported in Stephens N. P. 2081.

[4] Brinley *v.* National Ins. Co. 11 Met. (Mass.) R. 195.

if they see fit, to protect themselves against the recovery of excessive damages, or for any other reason. But if they elect not to make the repairs, they are liable only to pay a fair indemnity for the loss. But whatever may be the rule when the building insured is particularly injured by the peril insured against, it has no application to cases like the present, where the building is totally destroyed, and is to be replaced by a new one. The rule of damages in marine policies, would not apply to a case where the ship had been totally destroyed. In the present case, the building was destroyed by fire, and a new building was erected on a different plan; so that the cost of a new building could not be certainly ascertained. If the rule laid down in Vance *v.* Foster,[1] were applied, the party must ascertain, by the estimates and opinions of witnesses, the amount of the expenses of a new building, and they must estimate the value of the old building, in order to ascertain the difference, if any there be, between the new and the old. We can perceive no use in requiring this double estimate; for where the plaintiff is only entitled to recover the amount of the value of the building destroyed, the estimate of the cost of a new building is useless. We are therefore of opinion that there is no rule of damages applicable to the present case; and that in all cases where no rule of damages is established by law, the jury are to decide upon the question, and that to their decision there can be no legal exception. The instructions were conformable to these principles, except in one particular. The jury were instructed that no deduction was to be made for the expenses of repairing or rebuilding the store insured, although the new building might be more durable than the old building would have been, and for some purposes more valuable. In this respect, we think the jury were misdirected."

§ 270. A policy of insurance against fire contained a pro-

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[1] *Ub. sup.*

viso, allowing the underwriters at their election, to replace the property lost or damaged, with other of the like kind and quality within sixty days after notice of the loss or damage; and after a loss under such a policy, the assured, by an order thereon, directed the loss to be paid to his mortgagee, and the underwriters assented thereto. It was held, that such order and assent operated as an assignment of the claim of the assured under the policy, without affecting the right of the underwriters to replace the property lost, or to pay the amount of the loss in money, at their election. The mortgagee clearly had an inducement to obtain control of the policy; for if the underwriters had paid the assured the amount of the loss in money, the mortgagee would have had no means of compelling him to expend it in the erection of another building; and to that extent the plaintiff's security would have been impaired; whereas, the assignment placed the plaintiff in a situation in which he must be benefited, whether the underwriters erected another building or paid the amount of the loss in money. It was contended, that the *assent of the underwriters* to the assignment of the policy, was a waiver by them of their right to rebuild, and an agreement to pay the loss in money; but the court held to the contrary.[1]

§ 271. In Trull *v.* Roxbury Mutual Fire Insurance Company,[2] "the action was brought to recover damages for loss by fire on two stables belonging to the plaintiff, separately insured by the defendants for $1000 each, for the term of seven years. The plaintiff, according to the charter and regulations of the company, and conformably to the usual course of proceedings of mutual insurance offices, paid the defendants a certain amount by way of premium, on taking the policy, and at the same time gave them his deposit note, by which he became liable to pay such assessments as should be laid thereon

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[1] Tolman *v.* Manufacturers Ins. Co. 1 Cush. (Mass.) R. 73.

[2] Trull *v.* Mutual Fire Ins. Co. 3 Cush. (Mass.) R. 263.

by the president and directors of the company. Two stipulations in the policy were regarded as material. The first was, that the company agreed to pay all losses, which shall happen to the buildings, within the term, 'not exceeding the amount insured thereon.' The other provision was, that, 'in case of loss the company may replace or repair within a reasonable time.' The material facts, stated in the case agreed, were, that after the policy attached, the buildings were both burnt. One was entirely consumed, and the other was burnt down, but some of the sills and other timbers belonging to it were not wholly consumed. The plaintiff claimed for a total loss, but the company elected to repair and replace the buildings, which they did within the time limited; the first mentioned building at a cost of eight hundred dollars, and the other at that of six hundred and fifty dollars. Subsequently, but within the term for which the insurance was made, the new buildings took fire and were wholly consumed; whereupon, after due notice, proof, and demand, the action was brought. The defendants contended, that when the first building was wholly consumed, and was wholly replaced or rebuilt, at their expense, this was in the nature of an adjustment as for a total loss and payment thereof; that although the policy was not cancelled, or surrendered, yet it was at an end by a complete performance on their part; and that although the sum paid by them was somewhat less than the sum insured, still it was a complete indemnity, by placing the buildings in as good a condition as before the fire, and was therefore a fulfilment of the terms of their contract of indemnity." By Shaw, C. J., "The court are of opinion, that this is a mistaken view of the nature of this contract, and of the rights of the assured; arising perhaps from a supposed analogy between this contract and that of a policy of marine insurance. The contract between a mutual fire insurance company and a party insured by it is somewhat peculiar. The assured is a member of the company so long as the policy exists; and the insurance is for a term of time, usually for seven years. He pays a sum in the outset as a

premium and deposit, estimated at a rate somewhat more than sufficient to pay probable current losses, and with a right to a *pro rata* return, at the end of the time, if, upon a statement of an account of all the losses, which have occured during the whole of such time, the premium and deposits have not been absorbed in the payment of losses. He also makes himself liable to pay assessments, to a limited amount, in order to pay losses to other members, should any occur within the time, which the sums received for premiums and deposit might not be sufficient to cover. Such being the contract between the parties, there seems to be no ground to hold, that it is terminated by the payment of any loss. The assured, by his deposit note, is liable to assessment according to the terms of the policy, during the whole term; and the land, on which the buildings stand, is subject to a lien for its security. Were it not for the express limitation in the policy as to the amount of the sum insured, we do not see why the company might not be liable for successive losses. The distinction between the contract of fire insurance, and that of marine insurance, and the mode of adjustment and satisfaction, is marked and obvious. In fire policies, the assured recover the whole loss, if within the amount insured, without regard to the proportion between the amount insured and the value of the property at risk; whereas, in marine policies, the insurer pays only such a proportion of the actual loss, as the sum insured bears to the value of the property at risk. For instance, on fire policies, if the sum insured be $2,000, on property worth $10,000, and the assured sustains an actual loss on the whole, he recovers the whole $2,000. But in a like case, on a marine policy, he would recover one fifth only, or $400; being the proportion which the sum insured bears to the value at risk; the assured himself bearing the other four fifths of the risk. The result is, that every settlement of a loss by fire is in the nature of the adjustment of a partial loss, although it may amount to the whole sum insured. It is the payment of the whole actual loss sustained, on the whole property at risk, not exceeding

the sum insured, without regard to any apportionment between the sum insured and the property at risk, or to any abandonment or technical or constructive total loss, or salvage.[1] We can therefore perceive no analogy between the rebuilding of the stables, though it fully replaced the former structures, and the payment of a total loss. It was clearly not to the amount insured; and it was not competent for the defendants to say that it was overvalued; the value having been agreed on by the parties. In the absence of fraud, — such fraud as would invalidate the policy, — the valuation is conclusive upon both parties.[2] The sum insured on each building being $1,000, the assured is entitled to indemnity thereon to the amount of $1,000, and this was not exhausted by paying the several sums of $800 and $650 towards rebuilding, any more than it would have been by paying the plaintiff the like sum in money. The court are therefore of opinion, that he is entitled to judgment for $550, being the difference between the sums insured, and the sums paid for former losses, on the two buildings."

§ 272. Whenever, by the terms of a policy of fire insurance, the underwriters are authorized, within a limited time after proof of loss, to elect to replace the articles lost or damaged by the fire, they are not entitled to file a bill in equity, for an injunction to restrain the assured from removing or disposing of his goods until after the expiration of the time limited; in order to enable the underwriters to take an inventory, &c., with a view to such election. But if the assured should, without sufficient cause, refuse to permit the underwriters to make an examination of the goods saved from the fire, and a proper scrutiny as to the alleged loss, it would be proper evidence to submit to a jury, in a suit brought upon a policy;

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[1] Liscom *v.* Boston Mutual Fire Ins. Co. 9 Met. 205; Holmes *v.* Charlestown Mutual Fire Ins. Co. 10 Met. 211.

[2] Fuller *v.* Boston Mutual Fire Ins. Co. 4 Met. 206; Holmes *v.* Charlestown Mutual Fire Ins. Co. 10 Met. 211.

and it would authorize the jury to presume that the statement of the loss was in bad faith. Chancellor Walworth was unable to find any case for a bill in equity in a case of this kind, and he was moreover not aware of any principle upon which it might be sustained.[1]

§ 273. If, after an adjustment and a settlement of loss by fire, it be discovered that there was fraud in the original contract, or that there were circumstances attending the loss which, if known at the time the loss was claimed and paid, would have justified their resisting the demand; it appears just that the insurer should be allowed to maintain an action for money had and received, to recover back the sum improperly demanded and paid; though if at the time the money was paid it was known, or might have been known upon proper inquiry, that there was a ground on which the claim could be resisted, there can be no recovery back; infinite litigation cannot be tolerated. Marshall conceives, that even if after the assured has recovered the loss by *process of law*, the insurer receives intelligence of fraud which could not possibly have been known whilst the suit was depending, an action in that case is maintainable to recover back the money. If money be actually *paid*, it cannot be recovered back without proof of *fraud;* but a *promise* to pay, as by an adjustment, is not binding unless founded on a previous liability. Such a construction is as applicable to fire, as to marine, insurance.[2]

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[1] New York Fire Ins. Co. *v.* Delavan, 8 Paige, (N. Y.) Ch. R.

[2] Ellis on Fire and Life Ins. 95; and Marsh. on Ins. 740; Bilbie *v.* Lumley, 2 East, R. 469; Emerigon, ch. iv. s. 6. An underwriter who has, upon a full disclosure of facts, signed his initials to an adjustment on the policy, without paying the loss, is not precluded afterwards, in an action against him, from taking advantage of circumstances with which he had been acquainted, before signing the adjustment. By Lord Ellenborough: "What is an adjustment?" An admission, on the supposition of the truth of certain facts stated, that the assured are entitled to recover on the policy. Herbert *v.* Champion, 1 Camp. R. 134.

LIFE INSURANCE.

CHAPTER XII.

DEFINITION, OBJECT, AND HISTORY OF LIFE INSURANCE.

1. *Definition of.*
2. *Object and Utility of.*
3. *History of.*
4. *Mode of Effecting the Contract of, and Form of the Policy.*

§ 274. 1st. It was stated, in the preliminary portion of our work, that the contract of Insurance, as one of *indemnity*, had been extended to *human life*. An insurance upon Life is a contract by which the underwriter for a certain sum, proportioned to the age, health, profession, and other circumstances of the person, whose life is the object of insurance, engages that that person shall not die within the time limited in the policy; or, if he do, that he will pay a sum of money to him in whose favor the policy was granted.[1] A modern English writer thus explains it: "The risk in that branch of insurance called Life Insurance, is the death of the person whose life is the object of the security, and the insurer undertakes by the policy to pay the assured or his representatives a sum of money, either when that event may take place, if the insurance be for

[1] Park on Ins. 429; Hughes on Ins. 497; 1 Phillips on Ins. 147; 3 Kent, Comm. 439; 1 Beck, Med. Jurisp. ch. xii.

the whole life; or upon the happening of that event within a certain limited period, or before the occurrence of some other uncertain event, where the policy is effected for a term."[1]

§ 275. 2ndly. In considering the nature of Life Insurance, as above defined, what is naturally first suggested, is the importance of a person's security to *personal representatives*, to be disposed of in such manner as *he* may *direct* by *will*, a sum of money payable at his death, by the payment of an annual premium, proportioned to his age at the time of effecting the insurance. So a person possessed of an annual income only, may upon *marriage*, secure to trustees of a settlement, for the benefit of his widow and family, such a sum as it may suit his circumstances to insure. A creditor likewise, who may entertain doubts in respect to the security of a debt, may protect himself from the loss which may be consequent upon the death of the debtor, by insuring his life, either for the whole term of life, or for a limited period. These examples are given by Ellis;[2] and he adds, also, that, "a tenant holding an estate by lease, insurable upon the dropping of one or more lives on payment of a fine, may, by insuring the life of the survivor of the person upon whose death the fine would be payable, relieve himself from the inconvenience of having to provide for the payment of a large sum at some unexpected period." "So as," he adds, "a person may also insure a sum to be payable on a child attaining the age of twenty-one, or any other period, for the purpose of *advancing him* in the world, or, in case of a female, for a *marriage portion;* or if he has advanced any large sum of money to a child, he may by insurance secure himself from the loss of it, consequent upon the premature

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[1] This explanation of Life Insurance is given by an author who, in 1846, published a work on "The Law of Fire and Life Insurances," which was written at the request of the Society, in England, for the Diffusion of Useful Knowledge; namely, George Morley Dowdeswell, of the Inner Temple. See, also, 1 Bell, Comm. 544.

[2] 1 Ellis on Fire and Life Ins. 99.

death of the child."[1] Park[2] thus enumerates the purposes and advantages of Life Insurance: "The advantages resulting from life insurance are many and obvious; and most of them may be reduced under the following classes: To persons possessed of places or employments for life; to masters of families and others, whose interest is subject to be determined, or lessened, at their respective deaths; who, by insuring their lives, may secure a sum of money for the use of their families; to married persons, where a jointure, pension, or annuity depends on both or either of their lives, by insuring the life of the persons entitled to such annuity, pension, or jointure; to dependents upon any other person, during whose life they are entitled to a salary or benefaction, and whose life being insured, will enable such dependents, at the death of their benefactor, to claim from the insurers a sum equal to the premium paid; to persons wanting to borrow money, who, by insuring their lives, are enabled to give a security for the money borrowed."[3] Kent,[4] in reference to Life Insurance, says, "These insurances are liberal contracts, and while they create an advantageous investment of capital, they operate benevolently towards the public. Their usual purpose is to provide a fund for creditors, or for family connections in case of death. The insurer, in consideration of a sum in gross, or of periodical payments, undertakes to pay a certain sum, or an annuity, depending upon the death of a person whose life is insured. The insurance is either for the whole term of life, or for a limited period. Such is the nature of these contracts, that they are well calcu-

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[1] See, also, 1 Bell, Comm. 544.

[2] Park on Ins. 429.

[3] "These," (adds the learned author, referred to,) "and many other advantages, being so obvious, the Bishop of Oxford, Sir Thomas Allen, and some other gentlemen, were induced to apply to Queen Anne, to obtain her charter for incorporating them and their successors, whereby they might provide for their families, in an easy and beneficial manner." Park refers to Poth. 150; and see, 1 Magens, 32.

[4] 3 Kent, Comm. 438. 7th edit. 1851.

lated to relieve the more helpless members of a family from a precarious dependence, resting upon the life of a single person; *and they very naturally engage the attention, and influence the judgment of those thinking men who have been accustomed to reflect deeply upon the past, and to form just anticipations of the future.*" "To enumerate," says Blaney, "all the cases in which life assurance might be found beneficial, would, perhaps, be a task of some difficulty; but to all persons whose incomes depend either on their own lives, or the lives of others, life assurance is of the utmost importance." Blaney on Life Assurance, 3. Williams, in his work on "The Principles of the Law of Personal Property," (published in 1848,) says, "The advantages of life insurance are now so well known that there is now no occasion to dilate upon them. By payment of a small annual premium during the life insured, a sum of money may be secured at the decease of the party, applicable to the payment of his debts, for a provision for his family, or any other purposes." A writer in Blackwood's Magazine, of July, 1853, in an article on "Life Assurance," on page 111, in advocacy of its encouragement, says, "Take the case of a man of forty, with a wife and three children. We shall suppose him to be engaged in a profession, and at the age of thirty to be in the receipt of 500*l.* per annum. He then, having no encumbrances, insures his life for the sum of 2,000*l.*, at the annual premium of 43*l.*, and as a reserved fund to meet contingencies, lays by annually 57*l.* All beyond that he considers himself free to expend. At thirty-five, his income having risen to 800*l.* per annum, he marries. His wife brings a portion of 3,000*l.*, which is secured on herself, and he now insures his life for the additional sum of 2,000*l.*, paying a further premium of 49*l.*, or 92*l.* in all. The united income of the couple is rather more than 900*l.*, out of which they spend 700*l.*, the contingency fund being now raised to 100*l.* At forty, with three children, he again insures for 2,000*l.* paying 57*l.* of premium, or 149*l.* annual insurance. The united income has risen to 1,100*l.*; he now spends 800*l.*, and, irrespective of his insurances, lays by 150*l.* Let us now see how his affairs will stand when he reaches the age of fifty.

At his death, whenever that may occur, his children will receive 6,000*l.*, and 3,000*l.* is secured to the mother. The savings of the first period will amount, irrespective of interest, to 285*l.*; of the second period, to 500*l.*; of the third, to 1,500*l.*, — in all, with interest, about 2,500*l.* The accumulated sums constitute, according to our ideas, a very fine provision for a family; and all the while a liberal rate of expenditure is allowed. We have calculated the assurances upon the non-participating scale; but supposing that the insurer selects the other rate, and pays annually for his 6,000*l.* about 172*l.*, the value of the policies, if he were to die at fifty, would be increased by nearly 1,700*l.*

§ 276. 3dly. The idea of Life Insurance, seems to have been suggested by a passage in the laws of Wisbuy,[1] and in a case in the English law books it appears that the hint thus afforded was not without its effect in England. There was an application to the Court of King's Bench, as long since as 1641, for a prohibition to the Court of Policies of Insurance, in an action which had been there commenced in order to recover the amount of a policy, effected on the life of a captain of a vessel by two persons who had become his bail in the Admiralty, during a voyage he was about to make to the West Indies. The insurance had been entered into by individual underwriters in the same manner as an ordinary shipping policy; and the case, as Dowdesville says,[2] "singularly illustrates the connection which most probably existed originally between maritime and

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[1] See *ante*, Introd. § 30.

[2] Dowd. on Life and Fire Ins. 9, 10. He cites Denoir *v.* Owle, Style, R. 166, 172; and see *ante*, Intr. § 1, *et seq.* "The precarious dependence of a numerous family upon the life of an individual, naturally suggests the idea of seeking some protection against a calamity which sooner or later must befall them; and this probably suggested the first idea of insurance upon lives as an expedient by which a pecuniary indemnity at least, might be secured to the sufferers, to rescue them from want. Blaney on Life Ins. 2.

life insurance, and shows how simply and naturally the latter may have sprung from, and grown out of, the former."

§ 277. It appears by an old case in Vernon, that the system of Life Insurance was introduced into England before the establishment of organized companies for the prosecution of that system; life policies then being subscribed by individuals after the manner of marine policies.[1] But the establishment of some permanent body, possessing a competent fund, it seems, was deemed of much importance by a Mr. Assheton; and to him belongs the honor of having originated the idea of employing insurance as the means of securing a provision for widows and families. That individual is said to have devoted himself to the encouragement of a scheme of Life Insurance, and although his schemes for promoting it, were at first unattended with success, he eventually, in 1699, succeeded in prevailing on the Mercers' Company to entertain it; and in order to carry his plan into execution, they settled estates then of the value of 2,888*l.* per annum as a security for the payment of 30*l.* annually to any widow for her life, for every 100*l.* which her husband subscribed to the fund. This was the first insurance office of the kind in London. In the ensuing year it was succeeded by another bearing the name of the "Society of Assurance for Widows and Orphans." But both schemes were limited and imperfect; and yet they attracted the attention of the public.[2] Dowdeswell says, that the individual above referred to, "justly felt it to be an indispensable preliminary that there should be a permanent body, possessing a competent fund, for an adoption of any system of Life Insurance;" and he refers to the Biographical Dictionary of the Useful Knowledge Society, and Chalmer's Biographical Dictionary, title, "Assheton."[3]

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[1] Whittingham *v.* Thornburgh, 2 Vern. Ch. R. 206; S. C. in Prec. in Chan. 202, (Anno, 1690,) cited in Ellis on Fire and Life Ins. 98.

[2] Dowd. *ub. sup.*

[3] Dowd. on Life Ins. p. 10.

§ 278. Still further to trace the history of Life Insurance in England, we come to the establishment of the AMICABLE SOCIETY for perpetual assurance, the oldest Life Insurance Company now in existence. We quote from Magens,[1] just referred to. "At London we have an office for the insurance of lives, at Serjeant's-Inn, in Fleet street, of which Mr. Postlethwait gives an account in the first volume of his Universal Dictionary of Commerce, page 150. It was erected the 25th of July, 1706, by a charter from Queen Anne, granted to the then Lord Bishop of Oxford, Sir Thomas Allen, Bart., and others, for incorporating them and their successors by the name of the AMICABLE SOCIETY FOR A PERPETUAL ASSURANCE OFFICE; whereby they might provide for their wives, children, and other relations, &c. And the chief view of the Bishop of Oxford seems to have been to induce clergymen to save a *premium* out of their yearly income, for insuring their lives; so that when they died their families might recover the sums insured; which has proved to be a comfort to many persons. And this, doubtless, is a very good institution." Since then, in the English metropolis, eighty additional companies have sprung up, to several of which charters of incorporation have been granted; and for the regulation of some others, private acts of parliament have been obtained. In England, therefore, the practice of Life Insurance has to this day, from a sense of its conveniences and benefits, been encouraged, and the legality of it in that country has been unquestioned.[2]

§ 279. Between the law of England on the subject of Life Insurance, and the laws of the governments of the nations on the continent, there has been a great contrast. On the continent of Europe, from an apprehension of the insecurity it might occasion, the practice of Life Insurance has, until recently, been declared illegal, and strictly prohibited by ordi-

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[1] Dowd. on Life Ins. 11; 1 Magens on Ins. 34.

[2] See Dowd. *ub. sup.*

nances; the pretext assigned being, that it is beneath the dignity of a freeman to have a pecuniary value set upon his life.[1] It was a maxim of the civil law that the life of a freeman was above all valuation; *liberum corpus æstimationem non recipit.*[2] Chief Justice Parker, of Massachusetts, in giving

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[1] Dowd. *ub. sup.*, and 3 Kent, Comm. (7th edit.) 438.

[2] See 3 Kent, Comm. *ub. sup.* The Edinburgh Review, vol. xiv. 1826–1827, p. 482, contains an article treating of the past history, present state, and future prospects of Life Assurance. From this we make the following extract: "The practice of Life Assurance is as yet, in a great degree, confined to England. The fact, however, is not to be traced to an ignorance of the principles among the continental nations, but to the comparative instability of their institutions, and to a consequent want of that security, which is the first and last requisite in Life Assurance operations; — to the comparative poverty of some nations, and the prevalence of a light-hearted inconsiderateness in others. These causes, separately or in combination, have prevented its introduction into most of the continental nations, and greatly limited its operations in all.

"It is a curious fact, however, that Annuity and Life Assurance transactions employed the attention of the scientific on the continent, at an earlier period than in this country. The subject, indeed, excited no inconsiderable interest, and much research and ingenuity were expended upon its cultivation. So early as 1671, the well-known Jean de Witt published a work in Holland, entitled, *De vardye van de lifrenten, &c.;* and he appears to have been preceded by Van Hudden, who also wrote on the value of Life Annuities. These writers treated of the subject upwards of twenty years before any similar publication was produced in this country. M. Struyck, in 1740, resumed the subject with much spirit; and M. Kirseboon succeeded him, in 1748, in a very elaborate work.

"In France, the subject engaged the attention of MM. D. Parcieux, senior and junior, St. Cyran, and Duvillard, whose publications appeared between the years 1746 and 1787; and in Germany it was prosecuted by Euler, Sussmilch, and Wargentin. The data, however, upon which all these writers proceeded being very imperfect, the conclusions which they attempted to deduce could not fail to be unsatisfactory. But the great misfortune was, that their researches led to few or no practical results. Had the event been different, fresh materials for the further elucidation of the science would have been afforded, as well as the most effectual stimulus for its prosecution. As it was, the scientific investigation of the principles not producing its ex-

the opinion of the court in Lord *v.* Dall,[1] in reference to Life Insurances, says, "It seems that these insurances are not

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pected fruits, the subject ceased at last to engage the attention of the literati.

"The only countries in Europe in which practical attempts are made at the present day to prosecute Life Assurances, and Annuity transactions, are France, the Netherlands, Germany, and Denmark.

"There are two *chartered* companies established in France, with these objects in view, namely, La Compagnie d'Assurances générales, and La Compagnie Royale d'Assurances. The efforts of these companies to circulate a knowledge of the principles, and to explain the great advantages to be derived from the general adoption of the practice, have been most zealous, most persevering, — and most unsuccessful. They have profusely distributed proposals, rates, and expositions, but all in vain. From many of the principal towns they have been forced to withdraw their agencies, on account of a total want of success; and great apathy continues to be manifested on the subject, both at Paris and in the provinces. The fact is the more remarkable, as the companies which have pressed this boon upon the French people are understood to be of great respectability; and the terms at which they offer to effect assurances are moderate, — not higher, indeed, than the average rates charged by similar institutions in this country, — while considerable doubts may be entertained, whether the duration of life is as great in France as in England.

"The French companies made a commendable attempt to introduce the practice of Life Assurance into Italy. It may be supposed, that the present character of the Italians, deteriorated, as it has been for so long a period, by the oppressions of despotic governments, little disposes them to sacrifice any share of their present enjoyments and personal comforts, for the sake of securing future benefits to others. The attempt, we believe, has wholly failed; and a similar effort in Switzerland has met with a similar fate. It is presumed the Swiss, never famed for riches, are not encumbered with any superfluous wealth at the present day. Annuity transactions, however, under the appellation of *Vitaligio*, are represented to be in common use in Milan. They have had their origin independently of the French companies, and are maintained without any connection with, or support from them.

"Three Life Assurance Societies have been recently established in the Netherlands, and the government deem the practice either so sacred, or so profitable, that an ordinance has issued strictly prohibiting any foreign com-

[1] Lord *v.* Dall, 12 Mass. R. R. 115.

favored in any of the commercial nations of Europe except England; several of them having expressly forbidden them,

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pany from entering the field, or competing with these native societies. They transact business, however, on so limited a scale, that not above 3,000*l.* sterling, under the most favorable circumstances, can be insured on one risk with the whole of them. Their premiums are higher than those of the French companies, but not considerably so; and although little has as yet been done, recent appearances afford reason to think, that the frugal Hollanders and the industrious Flemings will, ere long, resort generally to a practice which is certainly much more congenial to their tastes and habits, than to the character and feelings of their lively neighbors.

"One small society established at Elberfield, in the Dutchy of Berg, is the only institution of this kind to be found in Germany, including Austria and Prussia. It does not transact business on an extensive scale, but there is evidently a stronger disposition in favor of the practice among the States of the Germanic Union, than in any other part of Europe,—a fact which might have been anticipated from the character and dispositions of the people. The principal hindrance at present to the extension of the system in Germany, seems to arise from the want of a society, formed on a scale so extensive, and a basis so solid, as to attract the notice, and command the confidence of the various States. In the absence of such an institution, recourse is had in many places to the Alliance Assurance Company, which has established agencies in many of the principal cities, and in which confidence is reposed; partly, it may be, on account of the large capital invested in the undertaking, but chiefly from the names of some of its principal supporters being universally known in the mercantile world.

"Several small Life Assurance institutions exist in Denmark, but they appear to do positively nothing, while, as in the Netherlands, an ordinance exists prohibiting foreign societies from trenching upon their never exercised rights:—a folly from which the patriotic rulers of Denmark and Holland ought to escape with all convenient speed.

"Upon the whole, it seems very problematical, whether continental Europe is destined at the present era of its history, to enjoy extensively the substantial blessings afforded by the practice of Life Assurance. It is not likely that the apathy of the French, with reference to these subjects, should be removed for some generations; and although, in northern Europe, where the disposition to encourage such institutions is much greater, establishments of the necessary solidity might arise in a much shorter period, the occurences of a general war, against which, unhappily, we have no security,

for what reason, however, does not appear; unless the reason given in France is the prevailing one, namely, 'that it is indecorous to set a price upon the life of a man, and especially a *freeman*, which is above all price!' It is not a little singular, that such a reason should be advanced for prohibiting these policies in France, where freedom has never been known to exist, and that it should never have been thought of in England, which for several centuries has been the country of established and regulated liberty." In Genoa, insurance was forbidden on the lives of persons at the head of the government.[1]

§ 280. The practice of Life Insurance has been introduced into the United States, and has for some time been attracting attention, and now commands confidence in our principal cities.[2] Indeed, the United States offer, in many respects, a large field for the practice of insurance upon lives.[3] Still, it was made a question, in the argument, in a case in the Supreme Court of Massachusetts, in the year 1815, whether a policy of insurance upon a life was a contract that could be enforced; the law of England, applicable to such contracts, as it was suggested, never having been adopted and practised upon in this country. But the court, by Parker, Ch. J., said, "It is true that no precedent has been produced from our own records of an action upon a policy of this nature. But whether this has happened from the infrequency of disputes which have arisen, it being a subject of much less doubt and difficulty than marine insurances; or from the infrequency of such contracts, it is not possible for us to decide. By the

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would probably interfere materially with their progress, if its convulsions did not utterly overwhelm them."

[1] As upon the life of the Pope, or upon the life of the Emperor, or upon the lives of kings, cardinals, dukes, princes, bishops, or other eminent persons, spiritual or temporal. 1 Magens, 33, and 2 Ibid. 67.

[2] 3 Kent, Comm. 439, 7th edit.

[3] See Edinburgh Review for March, 1827, p. 490.

common principles of law, however, all contracts fairly made, upon a valuable consideration, which infringe no law, and are not repugnant to the general policy of the laws, or to good morals, are valid, and may be enforced, or damages recovered for the breach of them."[1] At a considerable later period, say the Supreme Court of Massachusetts, by Fletcher, J., "it was formerly held to be unlawful, and was forbidden in some foreign countries by particular enactments, as being repugnant to good morals, and opening a door to abuses. But a very different view is taken of the subject at the present time. Life Insurance has now become a very common and a very extensive business, and is regarded as highly beneficial to the community."[2]

§ 281. 4thly. According to the judicial views entertained in England, and in America, it appears that the contract of Life Insurance is one fairly made; the premium is a sufficient consideration; and there is nothing on the face of it which leads to the violation of the law, nor any thing objectionable on the score of public morals.[3] As the same general principles that are applicable to Fire Insurance, (of which we have treated,) are applicable to Life Insurance, in treating of the latter, it will avoid tautology and repetition to refer the reader back to the former portion of the work. It is only necessary to give an exposition of the law which may be considered, to any extent, peculiar to Life Insurance.[4]

§ 282. The usual mode in England, (and it is presumed that the practice is not essentially different in this country) of proceeding to effect insurance upon a life, is as follows: —[5]

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[1] Lord *v.* Dall, 12 Mass. R. 115.

[2] Vose *v.* Eagle Life and Health Ins. Co., 6 Cush. (Mass.) R. 42.

[3] Lord *v.* Dall, 12 Mass. R. 115.

[4] Smith Mer. Law, 467; 1 Phil. on Ins., 3d edit. 356; 2 Greenl. Ev. 409.

[5] From Ellis, on Fire and Life Ins. 100; and see 1 Beck, Med. Jurisp., ch. xii.

The party wishing to insure procures at the office a printed form of *proposal*, which is to be filled up by him. This form in general contains the following queries, or to some such purport or effect, the answers to which are to be written upon the adjoining blanks. 1. Name, residence, profession, business, or occupation of the person on whose behalf the assurance is proposed. 2. Name, residence, and profession, business, or occupation, of the person whose life is proposed to be assured. 3. Place and date of birth. 4. Age next birthday. 5. Has the party to be insured resided abroad, and if so, where, and for what period? 6. Is the party employed in military or naval service? 7. Has the party had the small pox or cow pox? 8. Has the party had the gout? 9. Is the party, whose life is to be assured, afflicted with rupture, fits, convulsions, asthma, insanity, or spitting of blood, or any other disorder tending to shorten life, and what? 10. Name and residence of the person's usual medical attendant, to be referred to for information as to present and general state of health. 11. Name of an intimate friend, to be referred to for similar information. 12. Sum to be insured. 13. Term for which the assurance is required. 14. Will the party attend personally at the office after this proposal, filled up, has been sent in? The office send printed queries to the usual medical attendant and the intimate friend mentioned in the proposal, relative to the habits of life as to temperance, and the state of health of the party to be insured, and these are usually to the following effect.

§ 283. *To the Medical man.* Whether he is in the habit of seeing the party frequently? Whether he attends him professionally? When he was last ill? What was his indisposition? Whether he has to the knowledge of the medical man been affected with any illness of such a nature as still to influence his general health, or has experienced any wound, hurt, or other accident? Whether he is now in perfect health? Whether he is or has been affected with spitting of blood, asthma, fits, insanity, gout, or rupture? Is he subject to any

affection of the head, lungs, heart, or viscera? Is he temperate in his habits of life. *Do you know* of any circumstance in his business or habits of living which may be considered as tending to impair his health or shorten his life? Queries much to the same effect are usually sent to the *intimate friend* referred to by the party. If the answers to these inquiries are satisfactory, the office then proceeds to make out and execute the policy, the party proposing the insurance having first signed a *declaration* or statement recapitulating the answers to the queries in the printed *proposal* relating to the age of the party to be insured, and the state of his health, and also that he thereby *agrees* that such declaration shall be the *basis* of the *contract* between himself and the company. This *declaration* is usually recited in the body of the policy; and the policy in a succeeding part provides, that in case any *untrue allegation* be contained in the declaration or statement delivered in to the office of the company on behalf of the said assured, or if it should be proved that the referees have *knowingly* given *false testimonials*, then the policy of insurance shall be void, and all premiums and moneys paid thereunder shall be forfeited to the company.

§ 284. The form of a policy is generally as follows:—It is a deed-poll executed by a certain number of directors of the office, and begins by reciting that the party has proposed to effect an assurance in the sum of upon the life of for the term of life, (or for a shorter term,) and has caused to be delivered to the company the *declaration* (before-mentioned) which is shortly recited, and which is stated to be the basis of the contract; that the party has paid the sum of as the consideration for the assurance of the said sum of for a year commencing on day and terminating on day. It is then witnessed that the subscribing directors of the company agree, that in case the assured shall die within the term of a year; or if the said assured shall, in the event of his living beyond the term of a year, pay or cause to be paid during his life the like annual premium of on

or before the day of in every subsequent year, the funds and property of the company shall be subject and liable to pay and satisfy to the assurer, his executors, administrators, or assigns, within *three* calendar months next after proof shall have been given to the satisfaction of the directors of the said company of the death of the assured, the full sum of together with such further sums (if any) as shall have been assigned to or in respect of this policy, as or by way of bonus to the sum thereby assured. The policy usually contains indorsements to the following effect:[1] That policies will not be considered to be in force beyond thirty days after the expiration of the year, unless the premium then due shall have been paid to the company; but should proof be given to the satisfaction of the directors that the party or parties whose life or lives have been assured continue in good health, the policies may be revived at any period within six months, on the payment of a specified fine, to be fixed by the directors, or even within a longer period, as twelve or thirteen months, on the payment of such a fine as the directors may think reasonable. Restrictions are made as to going beyond the limits of Europe, except under specified circumstances. That assurances made by persons on *their own lives*, will become void if they die *by duelling*, *by their own hands*, or *by the hands of justice*. The directors, however, may in such cases make such allowances as they may think reasonable.

§ 285. The American policies on lives are said to contain a condition, when relating to the lives of persons in the northern States, that the policy is to be void if the assured should die upon the high seas or the great lakes; or shall, without the previous consent of the company, pass beyond the settled limits of the United States, and of the British provinces of the two Canadas, Nova Scotia, and New Brunswick, or south of the States of Virginia and Kentucky; and they all contain the

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[1] See the Policy of the Crown Life Assurance Co. in the Appendix.

like condition or exception, if the assured enter into the military or naval service; or in case he should die by suicide, or in a duel, or by the hands of justice.[1]

§ 286. Sometimes a question arises as to the time *when* death happened; where a party has sailed on a voyage, and the ship has been presumed to have been lost; and this is a question for the jury. A verdict was returned for the plaintiffs in an action to recover from the underwriters the sum underwritten on the life of L. M., from the 30th January, 1777, to the 30th January, 1778; the evidence being, that about the 28th November, 1777, L. M. sailed from the Cape of Good Hope in the Swallow, sloop of war. Several captains of vessels, who had sailed the same day, believed that the Swallow must have been as forward on the voyage as their ships on the 13th or 14th January, 1778, the period of a violent storm; the Swallow was much smaller than their vessels, which with difficulty weathered the storm.[2]

§ 287. When the term of a Life Insurance exceeds one year, its whole value is hardly ever paid down at the time that the contract is entered into; but in the policy, an equivalent *annual premium* is stipulated for, payable at the *commencement* of each year during the term, but subject to failure with the life or lives insured. When the *value of an insurance* on any life or lives is mentioned, the *single premium*, that is, the total value of the insurance in present money, is always to be understood; when the *annual premium* is intended, it will always be so expressed.[3]

§ 288. By the express terms of all contracts of Life Insurance, the *entire* or full sum insured must be paid upon the

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[1] 3 Kent, Comm. 369.

[2] Beaum. on Fire and Life Ins. 47.

[3] 1 Milne on Annuities and Assurances on Lives, 164; 3 Kent, Comm., 7th edit. 444.

happening of one single event, namely, "the death of the party;" so that there is no distinction in this sort of policy between total and partial loss, as in the case of marine insurance. Thus, where the insurance is for the whole of life and the party assured dies, the whole sum for which the insurance was effected will be paid to his representatives, the extent of injury the assured meant to be protected against by his insurance having happened; the loss, therefore, must necessarily be a total one, and never can be partial, except in cases where a creditor insures the life of his debtor, and during the continuance of such insurance, receives part of the debt.[1]

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[1] Blaney on Life Ins. 67; Park on Ins. 57.

CHAPTER XIII.

DEATH BY THE HANDS OF JUSTICE AND BY SUICIDE.

§ 289. First, as to the restriction which has been mentioned as being inserted in policies against death by the "*hands of justice*," the question has arisen, whether, where a person insured his life, and afterwards suffered death by the hands of justice, the policy was thereby avoided. The Master of the Rolls, (Sir John Leach,) held, that it was not avoided; but afterwards, upon appeal to the House of Lords, that decision was reversed, it being considered contrary to the policy of the law, and as holding out an encouragement to the commission of crime, that the representatives of a party should be enabled to recover upon a policy in case of a death consequent upon the party's own act. By the policy of insurance,[1] which, on the 11th of January, 1815, H. Fauntleroy effected on his life with the Amicable Society, it was witnessed, that he, Fauntleroy, was admitted a member of the society; and the corporation bound themselves and their successors to pay to his executors, administrators, or assigns, such a proportion of the joint stock or fund as on his death should become due, according to the society's charter and by-laws. In October, 1824, Fauntleroy was declared a bankrupt, shortly after he was convicted of forgery, and on the 20th of November he was executed, pursuant to his sentence. The premiums had been duly paid up to the time of his death. By the sixth by-law, the policy was to be vitiated in certain cases therein mentioned, which are common to most insurance offices, but the above-named event

[1] Bolland *v.* Disney, 3 Russ. Ch. R. 351; 4 Bligh, 194, N. S.

of *dying by the hands of justice*, by their own hands, or by duelling, was not inserted. The bill was filed by the assignees of Fauntleroy, praying, that an assignment of the policy, which had been made in 1819, might be declared to be void, and that the Amicable Society might be decreed to pay to the plaintiffs what was due on the insurance. The question argued was between the plaintiff and the Amicable Society, who contended that because Fauntleroy had perished by the hands of justice, no person could make any claim against them under the policy of insurance. By the Master of the Rolls — "When the policy does not provide that the obligation to pay shall determine, if the event insured against shall happen in a certain specified manner, then, if the event do happen in that manner, the obligation to pay shall not determine merely because the conduct of the party insured produced the event, even though such conduct was an offence against the criminal law of the country. To avoid the obligation to pay, the act of the party insured, which produced the event, must be done fraudulently, for the very purpose of producing the event. Decree for the plaintiff." But this decision, for the reason above stated, was afterwards reversed upon appeal to the House of Lords.[1]

§ 290. Secondly, in regard to *suicide*, which, as has been mentioned, is made an exception in a policy of Life Insurance: The word "suicide" is of modern origin; it does not occur in the Bible, or in any English author before the reign of Charles II.; probably not till after the reign of Anne.[2] The death certainly cannot be said to have been occasioned by any *fraudulent* act of the assured, it usually originating from causes adverse to that of any design to impose upon the underwriters; as, for

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[1] 4 Bligh, R. 194, new series.

[2] Per C. B. Pollock, in Clift *v.* Schwabe, 3 Mann., Grang. & Scott, R., on p. 472. The attention of the reader is particularly invited to the opinion of the learned judge just named, in which he is elaborate in explaining what is meant by "suicide," and he cites authorities both lay and legal.

instance, aberration of mind, produced, perhaps, by losses in business, domestic calamities, etc., and as the occurrence of such cases often involve families in pecuniary distress, it has been considered just and honorable for underwriters, in such cases, to return at least the the *whole amount* of the premiums paid; in which case they would be amply remunerated for trouble by the profits arising from such premiums. Such is the view taken by an author who has given special attention to the subject of Life Insurance;[1] and he says, that "in the Court of Exchequer an action was brought to recover the amount of a policy of assurance, the payment of which was resisted, under the plea that the assured had committed suicide; but the jury marked their displeasure of the defence by giving a verdict for the plaintiffs."[2]

§ 291. But what does a provision in a life policy import, which is, that such policy is to be void in case the assured shall "*die by his own hand.*" Does it import a *death by suicide*, which is an act of *criminal* self-destruction? This question came before the Supreme Court of the State of New York, in the case of Breasted *v.* Farmers' Loan and Trust Company.[3] The declaration was on a policy of insurance upon the life of H. C., the plaintiff's intestate; and the instrument contained a clause providing that, in case the assured should die upon the seas, &c., or *by his own hand,* or in consequence of a duel, or by the hands of justice, &c., the policy should be void. The plea of the defendants was, that H. C. committed suicide by drowning himself in the Hudson river; to which was the replication, that when the assured drowned himself, he was of *unsound mind and wholly unconscious of the act.* By the Court, NELSON, Ch. J. "The question arising upon the demurrer is, whether Comfort's self-destruction in a fit of insa-

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[1] Blaney on Life Assurance, 70, 71, (London, 1837.)

[2] And see 1 Beck, Med. Jurisp. 688.

[3] Breasted *v.* Farmers' Loan and Trust Co., 4 Hill, (N. Y.) R. 73.

nity can be deemed a death *by his own hand*, within the meaning of the policy. I am of opinion that it cannot. Since the argument of the case, I have examined many precedents of life policies used by the different insurance companies, and am entirely satisfied that the words in the policy in question import a *death by suicide.* Provisos declaring the policy to be void in case the insured *commit suicide*, or *die by his own hand*, are used indiscriminately by different insurance companies as expressing the same idea; and so they are evidently understood by the writers upon this branch of the law. The policies of the 'Society for Equitable Assurances upon Lives,' and of the 'Crown Life Assurance Company,' contain the same form of expression as that employed in the policy in question; and Mr. Ellis[1] refers to the phraseology as importing the usual condition to be found in all policies, though a majority of them probably use the word *suicide.*[2] That word is used in the policies issued by the following companies, namely, the 'Royal Exchange and London Assurance,' the 'Westminster Society,' the 'Equitable Assurance,' the 'Pelican Life Insurance,'[3] and the 'Sun Life Assurance;'[4] and it is said by the American editor of the book last cited, (p. 95, note,) that the policies issued in this country contain the same phraseology.[5] Mr. Selwyn mentions several of the insurance companies above named, and others, including those whose policies contain the same words as the one in question, and speaks of the proviso as meaning, in all cases, an act of suicide.[6] The connection in which the words stand in the policy would seem to indicate that they were intended to express a criminal act of self-destruction; as they are found in conjunc-

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1 Ellis on Fire and Life Ins. 230, 234.

2 Ibid. 102.

3 Marsh. on Ins. 780.

4 2 McCull. Com. Dict. 93, 94, (Amer. edit.)

5 See also 3 Kent, Comm. 369.

6 2 Selw. N. P. by Wheaton, 788 to 790, (Amer. edit. of 1823); see also Smith's Merc. Law, 256.

tion with the provision relating to the termination of the life of the insured in a duel, or by his execution as a criminal. This association may well characterize and aid in determining the somewhat indefinite and equivocal import of the phrase. Speaking legally, also, (and the policy should be subjected to this test,) self-destruction by a fellow being bereft of reason, can with no more propriety be ascribed to the act of his *own hand*, than to the deadly instrument that may have been used for the purpose. The drowning of Comfort was no more *his act*, in the sense of the law, than if he had been impelled by irresistible physical power; nor is there any greater reason for exempting the company from the risk assumed in the policy, than if his death had been occasioned by such means. Construing these words, therefore, according to their true, and, as I apprehend, universally received meaning among insurance offices, there can be no doubt that the termination of Comfort's life was not within the saving clause of the policy. Suicide involves the deliberate termination of one's existence, while in the possession and enjoyment of his mental faculties. Self-slaughter by an insane man or a lunatic is not an act of suicide within the meaning of the law.[1] I am of opinion, therefore, that the plaintiffs are entitled to judgment on the demurrer."

§ 292. A very important case was tried in the English Court of Common Pleas, at the Easter term, 1843, a decision in which depended upon a proviso (*inter alia*) in a life policy of insurance, — that in case "the assured should '*die by his own hands*,' or by the hands of justice, or in consequence of a duel," the policy should be void.[2] The assured, it appeared, threw himself into the river Thames, and was drowned. Upon an issue whether the assured died "by his own hands," the jury found

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[1] 4 Bl. Com. 889; 1 Hale's Pl. C. 411, 412.

[2] Borradale *v.* Hunter, 5 Mann. & Grang. R. 639; S. C. 5 Scott, New Reports, 418.

that he "voluntarily threw himself into the water knowing at the time that he should thereby destroy his life, and intending thereby to do so; but at the time of committing the act, he was not capable of judging between right and wrong." The decision (which was not a unanimous one) was, that the policy was avoided, as the proviso included all acts of voluntary self-destruction, and was not limited by the accompanying provisos to acts of *felonious* suicide. Of this opinion were MAULE, ERSKINE, and COLTMAN, Judges; it appearing to them, as expressed by the former judge, "That the fair inference to be drawn from the nature of the contract would be, that the parties intended to include all wilful acts of self-destruction, whatever might be the moral responsibility of the assured at the time: for although the probable results of bodily disease produced by physical means, may be the fair subjects of calculation, the consequences of mental disorder, whether produced by bodily disease, by external circumstances, or by corrupted principle, are equally beyond the reach of any reasonable estimate. And reasons might be suggested why those who have the direction of insurance offices should not choose to undertake the risk of such consequences, even in cases of clear and undoubted insanity. It is well known, that the conduct of insane patients is, in some degree, under the control of their hopes and fears, and that especially their affection for others often exercises a sway over their minds, where fear of death or of personal suffering might have no influence: and insurers might well desire not to part with this restraint upon the mind and conduct of the assured, nor to release from all pecuniary interest in the continuance of the life of the assured, those on whose watchfulness its preservation might depend; and they might, further, most reasonably desire to exclude from all questions between themselves and the representatives of the assured, the topic of criminality, so likely to excite the compassionate prejudices of a jury, which were most powerful, too, on the trial of this cause." The opinion of TINDAL, Ch. J., dissenting from those of the other judges, was as follows: — "The question is, whether the death of the assured has, by

the finding of the jury, been brought within the proviso, whereby the policy is made void in the several cases therein enumerated; and it appears to me, upon the proper construction of the words of that proviso, the death of the assured has not been found by the jury to fall within any of the exceptions contained in the proviso, and, consequently, that it is a death covered by the policy itself. It is to be observed, that the words of the proviso are the words, not of the assured, but of the insurers, introduced by themselves for the purpose of their own exemption and protection from liability; both in reason and good sense, therefore, no less than upon acknowledged principles of legal construction, they are to be taken most strongly against those that speak the words, and most favorably for the other party. For, it is no more than just, that, if the words are ambiguous, he, whose meaning they are intended to express, and not the other party, should suffer by the ambiguity. Indeed, the words, 'dying by his own hands,' are words in themselves much wanting in certainty and precision; those words including, if taken literally, many cases of death by the hand of the party which are admitted to be without the meaning and intention of the proviso, and, again, excluding many cases which are admitted to fall clearly within it. Upon a strict construction, according to the very letter of the proviso, every death occasioned by the *hand* of the party, would fall within their range, and would be excluded from the protection of the policy, whether the mind and intention of the assured accompanied the act, or whether it was death by misadventure only; as, death occasioned by falling on a sword or knife, or the discharge of a gun in the hand of the party; or death inflicted by the hand of the party when under the influence of sudden frenzy or delusion; and yet such cases are admitted, and justly admitted, not to be within the meaning of the proviso. And, on the other hand, under the same rigid construction, no death by the very act of the party himself, by drowning himself, or precipitating himself from a height, or suffocating himself, or in the innumerable instances that might be put, in which the *hand* of the party is not the immediate

cause of the death, could, in strict propriety, be held to fall within the words, notwithstanding the act was done intentionally by the assured; and yet, in all these last-mentioned cases, no doubt can be entertained that they fall within the meaning of the proviso. Considerable latitude must, consequently, be given to the construction of these words, which are thus used in a metaphorical, not a literal, sense, in order to arrive at, and give effect to, the real intention of both the parties; and, as the result of the finding of the jury is, that the assured killed himself intentionally, but not feloniously, the short question before us becomes this, whether the defendant can make out (for it lies on him to establish the affirmative) that the death of the assured, under those circumstances, falls within the meaning of the words in the proviso, 'dying by his own hands.' And it appears to me that he cannot; but that, looking at the words themselves, and the context and position in which they are found, *a felonious killing of himself*, and no other, was intended to be excepted from the policy. The words of the proviso are, 'If the assured shall die by his own hands, or by the hands of justice, or in consequence of a duel.' Three cases of death, therefore, are manifestly intended to be excepted from the protection of the policy,—a dying by his own hands, a dying by the hands of justice, and a dying in consequence of a duel; the word 'die' being prefixed to the first member of the sentence only, and overriding and governing the three cases therein specified. Now, the dying in consequence of a duel is a dying in consequence of a felony then in the very act or course of being committed by the assured; the dying by the hands of justice is a dying in consequence of a felony previously committed by him; and it appears to me, upon the acknowledged rule of construction, namely, *noscitur a sociis*, that the dying by his own hands, the first member of the same sentence and the third excepted case, should, if left in doubt as to its meaning, be governed by the same condition as the other two, and be taken to mean a felonious killing of himself, that is, self-murder. Upon what principle of construction shall the two latter cases be confined to a dying

by, or in consequence of, a felonious act, and the former, namely, the dying by his own hands, be open to a double construction, and include not only the case of felonious suicide, which it undoubtedly would, but also suicide not felonious? The expression, — 'dying by his own hands,' — is, in fact, no more than the translation into *English* of the word of *Latin* origin, — 'suicide:' — but, if the exception had run in the terms 'shall die by suicide, or by the hands of justice, or in consequence of a duel,' surely no doubt could have arisen that a felonious suicide was intended thereby: and, if so, ought a different construction to prevail because the *English* term is found in the policy instead of the *Latin?*" [1]

§ 293. In the above case the expression was, "shall die by his own hand;" but in a subsequent case in England, in the Exchequer Chamber,[2] the expression was, "commit suicide;" so that the decision in the former case was no direct authority on the point arising in the latter. The latter case was this: A effected a policy on his own life, subject, amongst others, to the following conditions, — that the policy should become void if the assured should commit suicide; and A died in consequence of having voluntarily, and for the purpose of killing himself, taken sulphuric acid, but under circumstances tending to show that he was at the time of unsound mind. In an action by the administratrix of A upon the policy, the defendants pleaded that A *did commit suicide*, whereby the policy became void; and, at the trial, the judge (CRESWELL) directed the jury, "that in order to find the issue for the defendants, it was necessary that they, the jury, should be satisfied that A died by his own voluntary act, *being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act that he was doing, so as to be*

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[1] The cause was ultimately compromised; but the report of the case, with the learning brought forward by the counsel and by the court, are well worthy of the special attention of every lawyer.

[2] Clift *v.* Schwaibe, 3 Mann. Grang. & Scott, R. 437.

a responsible moral agent; that the burden of proof, as to his dying by his own voluntary act, was on the defendants; but that being established, the jury must assume that he was of sane mind, and a responsible moral agent, unless the contrary should appear in evidence. Upon a bill of exceptions, it was held that this direction was erroneous; for that the terms of the condition included all acts of voluntary self-destruction, and, therefore, if A voluntarily killed himself, it was immaterial whether he was or was not at the time a responsible moral agent. But from this opinion Chief Baron POLLOCK and Mr. Justice WIGHTMAN dissented; those two learned judges being of opinion, that as soon as it is ascertained that a person has lost his sense of right and wrong, it matters not what else of the human faculties or capacities remain; and that he no more can commit suicide than he can commit murder.

§ 294. It has been said, that where a person effects an insurance, and puts an end to it by his own act, the law does not favor a return of premiums, as being contrary to public policy; and that it is to be lamented, that the law does not authorize a return of premium in cases so peculiar, and in which fraud has rarely, if ever, been detected.[1]

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[1] Blaney on Life Assurance, (London, 1837,) pp. 68, 69. He says, "The 'Atlas,' 'Crown,' 'Guardian,' 'Promoter,' 'West of England,' and 'Imperial,' and one or two other offices, with a kind of sympathetic feeling, promise, that in all such cases where the families of all such persons are left destitute, they will make such allowance as they shall deem just and reasonable. The 'Albion,' and 'United Kingdom,' with more apparent liberality, undertake, at all events, to pay the value of the policy in the same way they would have done if such policy had been surrendered in the lifetime of the party assured. The 'Law Life,' 'North British,' and 'Scottish Union,' limit the benefit, according to the discretion of their directors, in the event of the assured committing suicide." The same author tells us, that "Where policies are in the hands of assignees for a *bonâ fide* consideration, the 'Argus,' 'Guardian,' 'Hand-in-Hand,' 'Law Life,' 'North British,' 'Palladium,' 'United Kingdom,' and 'West of England,' will, in cases of suicide, &c., treat them as valid and subsisting.

CHAPTER XIV.

THE NATURE OF THE INTEREST REQUISITE IN LIFE INSURANCE.

§ 295. The importance, as a matter of expediency, and the consequent requirement of the law, that a party insuring against *fire* must have an interest in the *property* insured, has, in a previous chapter,[1] been fully discussed, in which it was made distinctly to appear, that the party insuring must *have an interest* in the property insured, in order to entitle him to recover. The party insuring upon a life must have an interest in the *life* insured.[2] Insurance upon lives as well as upon other events, in which the person insured has no interest, not only inevitably tends to introduce a pernicious sort of gambling speculations, but it is pregnant with serious mischief.[3] An old writer of eminence[4] speaks of the inhuman case of committing murder to gain the sum insured; and he relates thus: "An instance of which villainy happened a few years ago in a London apothecary, who, having got his wife's life insured, soon after killed her." He then adds: "It is indeed true that the insurers are not obliged to pay a murderer convict, as happened in the case of the aforementioned apothecary; yet this does not restore the life sacrificed."

§ 296. The holder of a note given for money *won at play*,

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1 See *ante*, chap. iv.

2 3 Kent, Comm. 7th ed. 441.

3 Ellis on Fire and Life Ins. 122; Williams on the Law of Personal Property, 133.

4 1 Magens on Ins. 33; (London, 1755.)

has not an insurable interest in the life of the maker of the note; the insurable interest of a creditor in the life of his debtor being required to be upon a good legal consideration.[1]

§ 297. In consequence of the perversion of the useful invention of Life Insurance, and with a view to repress abuses in the practice of it, the English Parliament interposed by a statute; as, at common law, it seemed to have been thought unnecessary that at the time of effecting the policy the assured should have had any interest which might be prejudiced by the happening of the event insured against. The statute 14 Geo. 3, c. 48, by section 1, enacts "that no insurance shall be made on lives, or any other event wherein the person for whose benefit the policy shall be made, shall have no interest; and that every such insurance shall be void;" and by section 3, "that in all cases where the assured hath interest in such life or event, no greater sum shall be recovered or received from the insurers than the amount or value of the interest of the assured in such life or other event."[2] It was held by the Court of King's Bench, that in order to render a policy valid within the meaning of this act, the party for whose benefit it is effected must have a *pecuniary* interest in the life insured; and that, therefore, a policy effected by a father in his own

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[1] An action was brought on a policy on the life of J. R., who was warranted in good health. By a memorandum at the foot of the policy, it was declared that it was intended to cover the sum of 5,000*l.*, due from R. to the plaintiff, for which he had given his note. Two objections were made on the part of the defendants. 1st. That part of the consideration for the note was for money won at play. 2d. That R., at the time he gave the note, was an infant. Mr. Justice Buller nonsuited the plaintiff, upon the ground of part of the consideration of the note being for a gaming transaction, and, therefore, there was a want of interest in the plaintiff. Dwyder *v.* Edie, (1788); 2 Park on Ins. 639, 7th ed.; 2 Marsh. on Ins. 779; Ellis on Fire and Life Ins. 127.

[2] Dowd. on Life and Fire Ins. 17; Rhind *v.* Wilkinson, 2 Taunt. R. 237; Ellis on Fire and Life Ins. 77; Wainwright *v.* Bland, 1 M. & Welsb. R. 32.

name, on the life of his son, he not having a pecuniary interest therein, was void.[1]

§ 298. The word "interest" in the above-mentioned statute of Geo. 3, does not mean an anxiety or solicitude about the life of the person, or a mere expectation of advantage,[2] from its continuance, however strong that may be, but contemplates some beneficial right valuable in the eye of the law, and the deprivation of which would occasion a pecuniary loss.[3] Hence a parent cannot, in that capacity alone, insure the life of his child; and a husband has not the requisite interest in the life of his wife.[4] The heir, either presumptive or apparent, of a person incapable, from idiocy or incurable lunacy, of making a will or executing a conveyance, has nothing more than a bare expectation, and cannot insure the life of that person against events which may deprive him of a descendible estate.[5] As has already been stated, although no positive legislative act has been passed in this country in respect to wager policies, yet they are held by our courts to be unlawful.[6]

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[1] Halford *v.* Kymer, 10 B. & Cress. R. 724. It seems that in Ireland wagering life policies are lawful; and that in an action on such a policy, interest need neither be averred or proved. In a case in the Court of Exchequer in Ireland, Joy, C. B., says — "The cases of marine insurance all go on the custom of merchants, who are presumed to have an interest, and not to effect insurances for the purpose of gambling. In such insurances, also, it is important for the insurer to know whether or not they are founded on interest. In life insurances, the same reason does not apply; and where the reason is different, the decision ought not to be the same." Shannon *v.* Nugent, Hayes (Irish) R. 536.

[2] See *ante*, Chap. IV.

[3] Dowd. 19, citing Lucena *v.* Crawford, cited *ante*, § 68; Mackenzie *v.* Mackenzie, 8 Eng. Law & Eq. R. 67.

[4] Dowd. *ub. sup.*; Reed *v.* Royal Exchange Assurance Co. Peake, Add. Cases, 70.

[5] Lucena *v.* Crawford, *ub. sup.*

[6] See *ante*, § 55, and Introd. § 18, *et seq.*

§ 299. It is clear that any person may insure the life of another, if he has any valuable pecuniary interest in the continuance of the life of that other, at the time of effecting the policy.[1]

§ 300. A question was made in Lord *v.* Dall, in Massachusetts,[2] whether the plaintiff had an interest in the life of her brother, which was insured. The plaintiff was a young female without property, and was and had been, for several years, supported and educated at the expense of her brother, who stood towards her *in loco parentis*. The court considered, that nothing could show a stronger affection of a brother towards his sister than that he should be willing to give a large sum to secure her against the contingency of his death, which would otherwise have left her in absolute want. No

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[1] Such is stated as a summary of the law in England upon the subject, in the excellent work of Dowdeswell on Life and Fire Ins. p. 21 ; and see Mackenzie *v.* Mackenzie, 15 Jur. 1091, and 4 Eng. Law & Eq. R. 67 ; Wainwright *v.* Bland, 1 M. & Welsb. R. 32. In a valuable work lately published on "Life Assurance," by an American author, "Dexter Reynolds, Counsellor at Law," we find that "in Valton and Adams *v.* National Loan Fund Life Assurance Society, in New York, three persons, Valton, Martin, and Schoonmaker, entered into a copartnership, to carry on the liquor business. Schoonmaker understood the business, and, as against the capital of Valton and Martin, was to put in his skill. Schoonmaker insured his life for ten thousand dollars, and by the articles of copartnership, in case of his death without children, or unmarried, his partners, Valton and Martin, were to receive the sum secured by the policy. Schoonmaker shortly afterwards died unmarried ; Martin assigned his interest to Adams, and Valton and Adams sued to recover the insurance. The ground taken was, that the plaintiffs had an insurable interest in the life of Schoonmaker ; that as he was to contribute only his skill, they had an interest in his life, not to be deprived of it, and thus of his skill and services. The court held, that they had an insurable interest, and the policy was not void for want of interest." The author cites Valton et al. *v.* National Loan Fund Life Assurance Society, at the Albany (N. Y.) Circuit, Wright, J., Nov. 1852. The case was then being carried up to the general term.

[2] Lord *v.* Dall, 12 Mass. R. 115.

one, the court thought, would hesitate to say, that in the life of such a brother the sister had an interest; and few would limit that interest to the sum of five thousand dollars. In reply to the argument, that the interest must be of a *pecuniary* nature, to make the contract valid, such as the interest which a creditor has in the life of his debtor, the court said, — "The case indeed of a creditor would leave no room for doubt. But with respect to a child, for whose benefit a policy may be effected on the life of the parent, the interest, except the insurable one which may result from the legal obligation of the parent to save the child from public charity, is as precarious as that of a sister in the life of an affectionate brother. For if the brother may withdraw all support, so may the father, except as before stated. And yet a policy effected by a child upon the life of a father, who depended on some fund terminable by his death to support the child, would never be questioned; although much more should be secured than the legal interest which the child had in the protection of his father. Indeed, we are well satisfied that the interest of the plaintiff in the life of her brother is of a nature to entitle her to insure it."

§ 301. A trustee may insure for the benefit of the *cestui que trust.* An insurance was made on the life of H. for one year, and during the life of the plaintiff. H. had granted an annuity to the plaintiff's late brother, which annuity he had bequeathed to persons not parties to the insurance, having made the plaintiff executor of his will, and directed him to make insurance. In an action on this policy, brought by the executor, it was objected, that as the annuity was not devised to him by the grantee, he had no insurable interest in the life of Holden, the grantor. But Lord Kenyon thought this a sufficient interest in the executor to support the action.[1]

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[1] Tidswell *v.* Angerstein, Peake, N. P. C. 151, cited in Ellis on Fire and Life Ins. 127.

§ 302. In Mackenzie *v.* Mackenzie,[1] it appears that by a postnuptial settlement, in 1810, R. M. settled the moneys to become payable on three policies of insurance on his life upon trust for B. M., his wife, for life; and after her decease, upon trust for his appointees; and in default of appointment in trust for the children of the marriage; and he covenanted to keep up the policies. In 1821, R. M. appointed that, after the death of B. M., the moneys should be made over *to his executors and administrators.* By a subsequent order of the Court of Chancery, in 1821, the trustees were directed to sell the policies to the insurance office, and to bring the money into court to be invested, the dividends to accumulate during the joint lives of R. M. and B. M. In 1828, R. M. took the benefit of the Insolvent Debtors' Act. In 1845, R. M. became bankrupt, and obtained his certificate. In 1847, B. M., the wife, died. In 1850, the children of the marriage presented a petition praying that they who were next of kin at the date of the appointment, might be declared entitled to the fund, and for payment, or that it might be accumulated till the death of R. M. By Lord Chancellor Truro, — "The children have no interest entitling them to resist the claim of the assignees. In the first place, the children have *no such interest* under the limitation to them in default of appointment. They never had a vested interest under that limitation, inasmuch as the very object of the settlement was necessarily a thing only existing inchoately, and even the executory interest which they took under the limitation in default of appointment was annihilated by the appointment. Regarded in this light, their claim as next of kin is a mere hope or chance of succession. In this respect they have only a possibility, or less than what is technically termed a legal possibility, of an interest capable of being set up as an *independent interest.* Nor have they any interest as next of kin under the settlement by means of the appointment itself. The children then, having no inte-

[1] Mackenzie *v.* Mackenzie, 15 Jur. 1091, and 8 Eng. Law & Eq. R. 67.

rest, properly speaking, under the settlement or the appointment, the husband, after the death of his wife, could have sold the policy to the insurance office, or the assignees might have sold it, and would have been entitled to the proceeds. But, in fact, it has been sold, and consequently they are entitled to the fund which has arisen from the sale who are now entitled to the settlor's interest."

§ 303. The reasons why there have not been more questions arisen upon the subject of interest in Life Insurance, have been thus stated by Ellis:[1] "Because the offices are never in the habit of taking that objection, unless they are under the necessity of resisting payment upon some other fair and proper ground, as fraudulent misrepresentation or concealment; and if they are driven to resist on such a ground, they then, in order to make their case the stronger, sometimes also object to the want of interest, when the policy is open to the objection. The offices are, in fact, constantly in the habit of taking insurances where the interest is upon a contingency which may very shortly be determined, and if the parties choose to continue the policy *bonâ fide* after the interest ceases, they never meet with any difficulty in recovering: so also they frequently grant policies upon interests of so slender and precarious a kind, that although it may be difficult to deny some kind of interest, it is such as a court of law would scarcely recognize.[2] This practice of the offices, of paying upon policies, without raising questions as to interest, is so general, that it has been even recognized in courts of law. As where a person bought a policy of insurance of another after the interest had expired, or was on the point of expiring, and some years after the sale

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[1] Ellis on Fire and Life Ins. 123.

[2] The author, Ellis, has seen a policy effected by a mother upon a son's life, the interest being no other than that he lived with her, and contributed largely to the expenses of housekeeping. So upon the life of a creditor who forbore to call in the debt, but which was likely to be called in by his personal representatives at his death.

and assignment, the executor of the purchaser, understanding that the office was not in law bound to pay upon the policy, brought an action against the seller to recover back the purchase-money. But Lord Tenterden, C. J., told the jury, that the only point for their consideration was, whether, at the time of the sale, there was any misrepresentation or concealment to vitiate the policy. It was true in point of law that the insurance ceased with the interest, but then they had it in evidence that the insurers never availed themselves of that objection." [1]

§ 304. A *bonâ fide* creditor has undoubtedly an interest in the life of his debtor, at least where he has only the personal security of the debtor, and this interest is by construction of law insurable. An insurance was effected on the life of Lord Newhaven from the 1st of December, 1792, to the 1st of December, 1793. In an action on the policy, the only question was as to the plaintiff's interest in the life insured, which, it was contended, was not sufficient to take this case out of the above rule. It appeared that Lord Newhaven was indebted to the plaintiff and a Mr. Mitchell in a large sum of money, part of which debt had been assigned by them to another person, the remainder, being more than the amount of the sum insured, was, upon a settlement of accounts between the plaintiff and Mitchell, agreed by them to remain to the account of Mitchell only. Lord Kenyon was of opinion that this debt was a sufficient interest. He said, "It was singular that this question had never been directly decided before; that a creditor had certainly an interest in the life of his debtor, because the means by which he was to be satisfied might materially depend on it; and that, at all events, the death must, in all cases, in some degree, lessen the security." The jury found a verdict for the plaintiff. It may be observed, says Ellis,[2]

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[1] Barber *v.* Morris, K. B., Feb. 19, 1831, MS.; 2 Moody & Malk. 62. A new trial was afterwards moved for, and refused.

[2] Ellis on Fire and Life Ins. 125.

that this note is very short and not very satisfactory; because, if the plaintiff had in fact assigned over his interest in the debt to Mitchell before the death of the assured, it is difficult to see how any insurable interest, within the statute, remained in him, unless we assume that the debt still remained legally due, and recoverable by the plaintiff from Lord Newhaven, the latter having no notice of the assignment of the debt in such settlement of accounts, or, upon the principle of Tidswell *v.* Angerstein,[1] we consider the plaintiff to be in the situation of a trustee. If a debt is amply secured by mortgage or otherwise, it would be very difficult to establish such an interest as would entitle the party insuring to recover, because the above act (stat. Geo. 3) declares that "no greater sum shall be recovered from the insurer than the amount or value of the interest of the insured in the life insured;" perhaps a case of this kind is not likely to occur in practice, as it is not usual to insure by way of collateral security, except when the principal security is doubtful.

§ 305. The damnification of a creditor, in respect to which his action upon an insurance upon the life of his debtor may be brought, may be fully obviated before the action is brought. As, in the words of Lord Mansfield, in a case of marine insurance, — "It is repugnant, upon a contract of indemnity, to recover as for a total loss, when the event has decided that damnification in truth is an average, or perhaps no loss at all." "Whatever," he adds, "undoes the damnification in the whole, or in part, must operate upon the indemnity in the same degree. It is a contradiction in terms to bring an action for *indemnity*, where upon the whole *no damage* has been sustained."[2] But one writer[3] seems to make Life Insurance an exception to the leading idea of Insurance in general,

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[1] *Ante*, § 301.

[2] Hamilton *v.* Mendes, 2 Burr. R. 1210, and see *ante*, § 193.

[3] Babbage in his "Comparative View of the various Institutions for the Assurance of Lives," London, 1826, cited in Pref. to Beaumont on Fire and Life Ins. on p. vi.

namely, that it is a contract of indemnity as distinguished from a wager,[1] and to think that Marine Insurance is distinguished by the circumstance of the claim of the assured depending on his right to *abandon*, and of such claim upon a *capture* being defeated by a *re-capture*, and that Life Insurance is void of any corresponding limitations of the claim. It is nevertheless settled to the contrary; so that if, after the death of the debtor, whose life is insured, and before any action be brought on the policy, the debt be paid, the creditor is not entitled to recover. In Godsall *v.* Boldero,[2] the plaintiffs were coach-makers, and on the 29th of November, 1803, they effected an insurance on the life of the Rt. Hon. William Pitt for 500*l.* for seven years, at an annual premium of 15*l.* 15*s.* In an action on the policy the plaintiffs averred, that "at the time of making the insurance, and from thence until the death of Mr. Pitt, they were interested in his life to the amount of the sum insured." It appeared that Mr. Pitt, at the time of the execution of the policy, and from thence to the time of his death, was indebted to the plaintiffs in more than 500*l.*, and died insolvent; and that after his death, and before the commencement of the suit, the executors of Mr. Pitt paid to the plaintiffs, out of the money granted by parliament for the discharge of his debts, 1,109*l.* 11*s.* 6*d.*, in full for the debt due to them from Mr. Pitt. The court determined that the plaintiffs were not entitled to recover; and held that this insurance, like every other to which the law gives effect, is in its nature a contract of *indemnity*, as distinguished from a wager;[3] that the interest which the plaintiffs had in the life of Mr. Pitt was that of the creditors, in a case where the probability of payment depended on the continuance of his life, and the indemnity sought by the insurance was against the loss which might result from his death; that the action was, therefore, founded on a supposed damnification of the plaintiffs, occa-

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[1] See *ante*, Intr. § 1, *et seq.*

[2] Godsall *v.* Boldero, 9 East, R. 72.

[3] See *ante*, § 18 of the Intr. and § 55 of the Treat.

sioned by his death, and *existing at the time of the action brought;* and consequently, if, before the action brought, the damages occasioned by his death were prevented by payment of his debt, the ground of action was taken away;[1] that it was no objection to this answer that the fund, out of which their debt was paid, did not (as was the case in the present instance,) originally belong to the executors, as a part of the assets of the deceased; for though it was derived to them *aliunde*, the debt of the testator was equally satisfied by them thereout; and the damnification of the creditors, in respect to which their action upon the insurance contract could be alone maintainable, was fully obviated before their action was brought.

§ 306. The above case was one in which the creditor had been paid his debt, and sought to recover upon the policy notwithstanding such payment; it was a case in which the creditor had received the money under the policy, and of the debtor's endeavoring to obtain the benefit of that payment, by procuring it to be applied in reduction of his debt. It was a

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[1] The office, it was understood, did not take advantage of the verdict, but paid the money to the plaintiffs before they left the court. Ellis on Fire and Life Ins. 126, n. *e*. The case of Craig *v*. Margatroyd, 4 Yeates, (Penn.) R. 169, proceeded upon the same broad ground as that of the above case of Godsall *v*. Boldero, although the circumstances were different. In both, insurance was considered as intended to be, in all cases, a contract of indemnity, unless when the object of the parties should appear to have been of a different character, and to have aimed at the creation of a wager policy. In the English case, the interest failed by the payment of the debt due by the party whose life was insured; in the American, by the receipt of an indemnity for the greater part of the loss from the proceeds of another insurance; and thus there followed the conclusion of law, in the former, that the right of recovery on the part of the assured was gone; in the latter, that it was diminished *pro tanto*. In both decisions, it appears, from the language of the courts, that had the parties intended a wager, the contract would have been void. See note of the American Ed. to Godsall *v*. Boldero, 2 Smith Lead. Cas. 157.

case distinguishable from that of Henson *v.* Blackwell.[1] In this case the facts were, that a debtor and his wife joined in an assignment of the chose in action of the wife to a creditor of the husband, to secure 300*l.* owing by the husband: the creditor afterwards insured the life of the wife in a sum of 200*l.*: the chose in action was not reduced into possession in the lifetime of the wife: the wife died, and the creditor received from the insurance office the 200*l.* In a suit in equity for redemption, it was held, that, if the creditor had no insurable interest in the life of the debtor's wife, the debtor could have no claim to the application of the sum insured, towards the payment of his debt; that here the creditor had such insurable interest, but the risk ceased at the death of the wife; and that the money afterwards paid by the insurance office, being paid in their own wrong, the debtor was not entitled to have it applied in reduction of his debt. Sir Lancelot Shadwell, in his opinion, said, — "If the defendant had (as I think he had) an insurable interest, there was an interest to which the court might, and, I think, ought to refer the policy, although the policy itself contains no express reference to that interest; and although there is no extrinsic evidence to show that it had reference to this particular transaction. Taking it, therefore, for the present, that the defendant had such an interest, can he retain to himself the benefit of the money which has been paid upon the policy?" The Vice-Chancellor then referred to the above case of Godsall *v.* Boldero as the leading case on the subject, and then continued, — "Now the case before me is not one in which the creditor has been paid his debt, and seeks to recover upon the policy notwithstanding such payment. It is a case in which the creditor has received the money under the policy, and the debtor is endeavoring to obtain the benefit of that payment by procuring it to be applied in reduction of his debt. The two cases are, therefore, distinguishable in form, and may, perhaps, be thought distinguishable in principle

[1] Henson *v.* Blackwell, 4 Hare Ch. R. 434.

also; for the case of Godsall *v.* Boldero, and others to the same effect, have only decided what, as between two contracting parties, was the meaning of the contract, which one of them sought to enforce against the other. In this case a person, who is a mere stranger to the contract, requires me to decide in his favor, first, what the contract was between his creditor and the insurance office; and, secondly, that he (the debtor) is entitled to the benefit of that contract, to which, in fact, he was an entire stranger. I do not say that there is any thing in principle which should necessarily exclude him from the right he claims. I do not say, that, if a stranger goes to a creditor of A. B., and offers to pay A. B.'s debt, and the creditor accepts payment of the debt from that stranger, there is any reason why the debtor, on being sued for the same debt, should not be allowed to adopt the act of the stranger,[1] and say: 'My debt has been paid: you have accepted payment in full of the demand.' If that may be done, the case would be the same in substance if a stranger for a valuable consideration becomes guarantee for another. The case of *Ex parte* Andrews[2] is an authority in point; for although Sir Thomas Plummer ultimately rested his opinion on the fact that it was the case of a trustee, he stated the law as clearly as possible in favor of the proposition contended for by the plaintiff. In Humphrey *v.* Arabin,[3] Lord Plunket appears to have intimated a doubt whether the law could be, as I consider it to have been, laid down in the cases. By these cases, according to my view of them, I am bound. It appears to me, as I have already intimated, that the defendant had an interest sufficient to entitle him to the guarantee, which, according to Godsall *v.* Boldero and the other cases, was all he acquired by the insurance. Upon the death of the wife in the lifetime of the husband, *there was no longer any risk;*

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[1] See *ante*, § 79, *et seq.*

[2] Andrews, *ex parte*, 2 Rose Ch. R. 410.

[3] Humphrey *v.* Arabin, Ll. & Go. Cas. Temp. Plunket, 322.

and the question arises, whether the guarantee was not as completely discharged, by that event — the only thing to be guarded against having become impossible to happen — as it was in Godsall *v.* Boldero, where the party received payment of the debt. The question is purely a legal question, and is of sufficient importance to justify me in saying, that if either party would wish to take the case to a court of law, I ought to allow him to do so." The counsel on both sides stated it to be the wish of the parties to obtain his Honor's decision, rather than to carry the case to a court of law; and by the Vice-Chancellor: "My opinion is against the plaintiff. If it had been a void policy, from the beginning, he could claim nothing. I think it was not void from the beginning; that the creditor had an insurable interest, but his right was only to effect a policy which would guarantee him against the loss which he might have sustained, if the wife had survived the husband. She did not survive her husband. The risk intended to be guarded against was at an end; and I think that, when the risk ceased, the guarantee must be considered as satisfied."

CHAPTER XV.

OF LIFE INSURANCE IN REGARD TO WARRANTY, REPRESENTATION, AND CONCEALMENT.

§ 307. What is a *warranty* in the contract of Life Insurance, and what, in connection with the same subject, is a *representation*, and whether material or not, and what is a *material concealment*, depends precisely upon the same principles which have been laid down as applicable to the contract of Fire Insurance.[1] It will appear, by having recourse to the chapters referred to in the note below, that the effect of a stipulation amounting to a warranty is to render the accuracy of the state of facts alleged in it a CONDITION PRECEDENT[2] of the insurer's responsibility, and he becomes bound only "if," and "in the event that" they are *literally* as the assured has thus represented them to be.[3] A declaration of the age and state of health made previous to the policy being issued, which is always referred to in the policy, is to be taken as a part of it;[4] and where there is no stipulation amounting to a warranty, an untrue allegation of a material fact, or a concealment of a material fact, will avoid the policy, though such allegation or concealment be the result of accident or negligence, and not

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[1] See *ante*, Chap. VI., "Of Warranty and Representation;" "Concealment," *ante*, Chap. VII.; "Misrepresentation and Concealment of the Interest of the Assured," Chap. VIII.

[2] See *ante*, § 142.

[3] Dowdeswell, 35.

[4] See 1 Bell, Comm. 545, 546.

of design.[1] The same as in fire policies.[2] As to an *implied* warranty, and as to matters *subsequent* and matters *precedent*, in a warranty, and as to an *affirmative* or *promissory* warranty; and as to *affirmative* and *promissory* representations, the reader is referred to the note below.[3]

§ 308. In the United States, the decisions which have been the direct results of warranty, representation, or concealment, in the contract of Life Insurance, are in number very limited compared to those which have been made in England; and yet it cannot be said of the latter that they are very numerous. For a valuable summary of the latter the author acknowledges his indebtedness for the saving of labor, to several English authors, who have given to the public valuable works on the subject of Life Insurance.[4]

§ 309. As in Fire Insurance, so in Life Insurance, the effect of warranty is to insure the accuracy of the state of facts alleged in it; and consequently the greatest care in making a declaration of them is requisite. There cannot well be too great care in making this declaration; and where there

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[1] Vose *v.* Eagle Life and Health Ins. Co. 6 Cush. (Mass.) R. 42.

[2] See *ante*, Chaps. VI. VII. VIII. There is an old case in the English Court of Chancery, 1690, in which a policy of insurance for insuring a life, gained by fraud, was set aside, both at law and in equity. Whittingham *v.* Thornburgh, 2 Vern. Ch. R. 206, and S. C. Prec. in Chan. 20; and see 2 P. Wms. R. 476; 3 Burr. R. 361. Policies are vitiated by fraud or falsehood as to the health of the assured. This is the point on which the physician's testimony may be, and indeed is, frequently required. 1 Beck, Med. Jurisp. 677.

[3] As to *implied* warranty, *ante*, § 144; as to matters *subsequent* or to matters *precedent*, *ante*, § 145; or an *affirmative* or *promissory* warranty, *Ibid.* As to *affirmative* and *promissory* representations, *ante*, § 149; and see also *ante*, § 281; Lord *v.* Dall, 12 Mass. R. 115; Vose *v.* Eagle Life and Health Co. 6 Cush. (Mass.) R. 42; Beck, Med. Jurisp. 674, (Ed. of 1850.)

[4] Viz.: Ellis on Fire and Life Ins.; Beaumont on the same subjects; and more *especially* the later production of Dowdeswell, which likewise embraces both the subjects of Fire and Life Insurance.

is a doubt, or even a deficiency of evidence, it may be prudent to object to the insertion of some of the clauses, for the insurers are at liberty to controvert them at any time, and the proof devolves upon the person claiming under the policy. In the event, therefore, of a dispute after the death of the party, it would be incumbent on the assured or his representatives, or a perfect stranger to whom the policy may have been assigned, without requiring the insurers to produce any evidence to impugn the truth of them, in the first instance to substantiate by legal evidence the facts affirmatively stated.[1] Hence it is desirable that the insurance office should, if possible, be satisfied in the first instance upon some points, and that these should be admitted upon the policy. The age of the party, which is capable of easy proof, is the only fact usually admitted, and this admission is said to increase considerably the marketable value of the policy, but there is no reason why, in many cases, the existence of the interest, where the insurance is effected by a third person, the correctness of the references, and the fact of the party having had the small-pox or cow-pox, should not likewise be admitted.[2]

§ 310. Upon the different clauses of declarations, varying slightly in terms from the form set forth, there have been several decisions, which will illustrate the view taken of them generally by the courts, and the spirit in which they are construed. Thus, a declaration that the party had not been afflicted with nor was subject to fits, was held by Lord ABINGER, C. B., to mean, not that he never accidentally had had a fit, but that he was not a person habitually or constitutionally afflicted with fits; a person liable to fits from some peculiarity of temperament, either natural, or contracted from some cause during life. In that case, therefore, the policy wherein it was contained, was held not to be vitiated by the circumstance

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[1] Rawlins *v.* Desborough, 2 Mood. & Rob. 70; Geach *v.* Ingall, 14 Mees. & W. 95.

[2] Dowd. vol. *sup.*

that, in consequence of a fall, the person whose life was insured had, several years before the date of the policy, two epileptic fits within a short interval,[1] which the jury were satisfied had never recurred. This case, it will be observed, was decided upon the peculiar expressions 'afflicted with,' or 'subject to' fits; the declaration did not positively allege, as in the form above set forth, that the party had never had a fit since his infancy, for had it done so, the defence to the claim on the policy must have prevailed, even though the seizures under which he was proved to have suffered were not calculated in any degree to impair life. It seems that if the assured takes upon himself to warrant that the person, whose life is the subject of the policy, never has had certain specified disorders, the bare fact that he has had any one of them suffices to annul it, and the degree or extent of the complaint, or the probability of its producing any permanent result on the constitution, is wholly immaterial. Notwithstanding the disorder may have assumed the mildest form, or exhibited itself in the most transient manner, so that its effect has wholly passed away when the statement is made, the insurers are entitled to insist upon the omission as a breach of this stipulation. In a very recent case,[2] Scott, the assured, had stated in the declaration, which was incorporated in the policy, that he was not afflicted with any disorder tending to shorten life; that he had not at any time been afflicted with insanity, rupture, gout, fits, apoplexy, palsy, dropsy, dysentery, scrofula, or any affection of the liver; and that he had not had any spitting of blood, consumptive symptoms, asthma, cough, or other affection of the lungs. Evidence was given by the insurers, upon the trial of an action brought upon this policy, that the assured, about four years before its date, had spit blood and exhibited other consumptive symptoms, and it appeared that he died three years after its date, of consump-

[1] Chattock *v.* Shaw, 1 Mood & Rob. 498.
[2] Geach *v.* Ingall, 14 Mees. & W. 95.

tion.. Lord DENMAN told the jury, that it was for them to say whether, at the time of making the statement, Scott had had such a spitting of blood, and such affection of the lungs, and inflammatory cough, and such a disorder, as would have a tendency to shorten life. The jury having found a verdict against the insurance company, the Court of Exchequer granted a new trial, on the ground that this was a misdirection. "By the expression 'spitting of blood,' says POLLOCK, C. B., "is, no doubt, meant the disorder so called, whether proceeding from the lungs, the stomach, or any other part of the body; still, however, one single act of spitting of blood would be sufficient to put the insurers on inquiry as to the cause of it, and ought therefore to be stated." ROLFE, B., also observes, "I have no doubt that if a man had spit blood from his lungs, no matter in how small a quantity, or even had spit blood from an ulcerated sore throat, he would be bound to state it. The *fact* should be made known to the office, in order that their medical adviser might make inquiry into its cause."

§ 311. The above case, then, forms a decision as to the extent of the disorder to which such a warranty applies, and a judicial exposition of the terms "spitting of blood," when used in similar warranties. The judgment of ALDERSON, B., however, forms a most useful commentary upon other portions of the warranty: "My Lord DENMAN," he says, "certainly does not appear to have sufficiently called the attention of the jury to the distinction between those disorders, respecting the existence of which, at the time of executing the policy, the assured was called on to make a specific declaration, and those which might have formerly existed. By 'spitting of blood' must, no doubt, be understood, a spitting of blood as a symptom of disease tending to shorten life: the mere fact is nothing; a man cannot have a tooth pulled out without spitting blood. But, on the other hand, if a person has an habitual spitting of blood, although he cannot fix the particular part of his frame whence it proceeds, still, as this shows a weakness of some organ which contains blood, he ought to communicate the

fact to the insurance company, for no one can doubt that it would most materially assist them in deciding whether they should execute the policy; and good faith ought to be kept with them. So, if he had had spitting of blood only once, but that once was the result of the disease, called *spitting of blood*, he ought to state it; and his not doing so would probably avoid the policy. Again, suppose this man had an inflammation of the lungs, which had been cured by bleeding, many physicians would perhaps say, that it was an inflammation of the lungs of so mitigated a nature as not to tend to shorten life; still that would be no answer to the case of the defendants, for it is clear that the company intended that the *fact* should be mentioned. As to the word 'cough,' it must be understood as a cough proceeding from the lungs, or no one could ever insure his life at all; and, indeed, it is so expressed in the policy — 'cough or *other* affection of the lungs.' Again, it is obvious that the insurance company meant to guard against the disease of dysentery. Now, a man may have had a dysentery, and been cured of it, still the office should know of the circumstance; and, indeed, that disorder may have been mentioned by name, as being one of a nature likely to return. All these instances show that it was not intended to restrict the statement of the assured to disorders having a tendency to shorten life at the moment of executing the policy: what the company demanded was, a security against the existence of such diseases in the frame."

§ 312. So a warranty that the person whose life is insured is of sober and temperate habits will not be complied with, and the policy will be void, if he be habitually a drunkard, though his health may be good, and his constitution may remain unimpaired. Upon a question arising out of such a warranty, with respect to a person named Stoneman,[1] COLERIDGE, J., told the jury: "You have to say, whether at the

[1] Southcombe *v.* Merriman, Car. & Marsh. 286.

date of the policy, and for such a reasonable time backwards as would allow of a man evincing a habit, Stoneman was a temperate man. It is said by the plaintiff's counsel that the question is, whether the deceased was intemperate to such a degree as to injure his health. I differ from that position: for the society has a right, from many motives of their own, to act on what rules they please, and to stipulate, as in this case, that, even though a man's health be not impaired, every person whose life is insured at their office shall be a person of temperate habits."

§ 313. The warranty that the party is in good health, means reasonable good health at the time of making the declaration, and does not import that he has not the seeds of disorder about him, nor even that he is not subject to any infirmity, so long as it is not an infirmity likely to produce death. Consequently, the fact of the party having received a wound twelve years before, which produced partial paralysis of the organs of retention of the urine and fæces, but not such an injury as was calculated to shorten life or affect the vital functions, was considered by Lord MANSFIELD not to have invalidated a policy entered into upon a warranty that the party was in good health at the time of effecting it. All that was necessary, he informed the jury, was proof "that the life was in fact a good one, and so it might be though he had a particular infirmity, and the only question was, whether he was in a *reasonable* good state of health, and such a life as ought to be insured on common terms."[1] And where the party was troubled with spasms and cramps from violent fits of the gout, which are not uncommon symptoms incident to that complaint, but at the time of effecting the policy was in as good health as he had been long before, and was not laboring under an attack of the gout, a warranty that he was in good health was held to have been complied with; the circumstance of the

[1] Ross *v.* Bradshaw, 1 W. B. 312; 2 Park on Ins., 924, 8th ed.

liability to gout having been communicated to the insurers, and no warranty made against it. Lord MANSFIELD in that case observed, that "a warranty of good health at the time can never mean that a man has not the seeds of disorder; we are all born with the seeds of mortality in us."

§ 314. A man subject to the gout is a life capable of being insured, if he has no sickness at the time to make it an unequal contract.[1] This principle was acted upon in a subsequent case by GRAHAM, B., who, on the trial of a cause, in which issue had been joined as to whether the plaintiff's wife was in good health as alleged in a warranty, and whether she was affected with any disorder tending to shorten life, left it to the jury to say, whether, from the evidence adduced of her habit of excessive drinking "they were satisfied that at the time of the insurance the mischief was actually done, and her constitution radically impaired, so as not to be a good life within the meaning of the warranty." In this instance the discussion seems to have been confined to the terms 'warranted in good health,' and the circumstances, which were cogent to show, and induced the jury to believe, that she was in a very precarious and bad state of health at the time of effecting the policy, rendered any question as to what would constitute a disorder tending to shorten life, superfluous.[2]

§ 315. It would, however, appear, that a disorder tending to shorten life does not include a disorder which may, and even does in the particular instance, increase to such an extent as eventually to produce death, unless it has attained an ascendancy at the time of effecting the insurance which creates jeopardy. Thus, Dr. Watson, whose life had been insured with a warranty that he was not subject to a disorder tending to shorten life, some time before the policy was effect-

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[1] Willis *v.* Pole, 2 Park on Ins., 935, 8th ed.

[2] Aveson *v.* Lord Kinnaird, 6 East, 188.

ed, had applied for medical advice on account of 'an affection of the bowels,' proceeding from dyspepsia. This was proved to be a disorder rendering the patient uncomfortable, but not generally tending to shorten life, *unless it increases to an excessive degree.* There was some evidence to warrant an inference that it had increased to such an extent, and it was shown that he ultimately died of it. The jury were thereupon directed, by GIBBS, C. J., to consider whether the dyspepsia under which he labored was, at the time of effecting the policy, of such a degree that *by its excess* it tended to shorten life, and they having decided that it was not, the court refused a new trial. CHAMBRE, J., remarked in the course of his judgment, "that all disorders have, more or less, a tendency to shorten life, even the most trifling; corns may end in mortification: that is not the meaning of the clause;" and GIBBS, C. J., also remarked, "according to the rule contended for, the assured to be insurable must have no disease at all," which was not intended.[1] It was admitted in this case that if the dyspepsia had been organic, which arises from a defect in some of the internal organs, the policy would have been avoided, as that disease has a tendency to shorten life. With respect to the state of health of the party, his declarations upon the subject made about the time will be evidence, even against another person who has insured the life, since, *ex necessitate rei,* they afford almost the only means after his death of ascertaining what he suffered, and what were his symptoms.[2] The warranty respecting the medical attendant has been several times the subject of question, and it appears from the cases that the expression *usual* medical attendant, means the person who at the time of effecting the policy is in the *habit* of attending the party. Mere accidental advice will not support the warranty, neither will a reference to a person who has once been the medical attendant, if

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[1] Watson *v.* Mainwaring, 4 Taunt. 763.

[2] Aveson *v.* Lord Kinnaird, 6 East, 188.

another medical man has subsequently been in attendance.[1] In one instance, a wife, whose life was insured by her husband, had, previously to her marriage with him, been attended by a medical man, once in 1829, and again in 1830, for serious illnesses. With this fact her husband was unacquainted. After her marriage, in 1832, Mr. D., another medical man, being in attendance on the family of the husband, on one or two occasions prescribed something for a cold under which she was suffering, but the causes for his doing this were so slight that he had not even made any charge. The husband having, under these circumstances, in 1833, made a declaration that Mr. D. was her usual medical attendant, the Court of Exchequer expressed a strong opinion that the conditions had not been complied with, and set aside a verdict found for the plaintiff.[2]

§ 316. In another case, Colonel Lyon had a regular medical man, (Mr. G.) who had attended him at his residence in the country for some time, but since his last attendance upon him, which was three years before the date of the policy, he had been attended by two other medical gentlemen, Dr. V. and Mr. J., in London, for a complaint in no way connected with that which ultimately produced his death. Of the fact that he had been thus attended, the assured (a third party) was ignorant, yet it was held that the statement by Colonel Lyon, in answer to the question, "who is your medical attendant?" "I have none except Mr. G.," which was incorporated in the policy, vitiated the contract.[3] The term 'medical attendant,' too, does not apply merely to a regular practitioner, it includes any person who acts in that capacity, even a quack doctor. This was instanced in a case which is worthy of rather a full detail. The plaintiff, wishing to insure the life of a man

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[1] Per Best, C. J., 5 Bing. R. 214.

[2] Huckmán *v.* Fernie, 3 M. & W. Rep. 505.

[3] Maynard *v.* Rhode, 1 Car. & P. 360; 5 Dow. & R. 266.

named House, referred the agent of the company to him for the necessary information respecting the declaration, and House stated, "I have never had occasion for a doctor: sometimes I have taken Harvey's quack pills, but Mr. V. knows as much of me as any man." The agent thereupon drew up the declaration, stating that Mr. V. was the medical man who usually attended House, and this was signed by the plaintiff. It was proved, however, that Mr. V. had not attended House for nearly twenty years, but that he had occasionally been attended from time to time by a quack doctor, called Dr. Harvey. The plaintiff was not aware of this circumstance. The court decided that it was "no matter whether Dr. Harvey was a good medical attendant or not, he was the person actually attending him," that the circumstance of the plaintiff being ignorant of the error did not affect the question, but that the policy was void.[1] An intention to abandon one who had been the usual medical attendant, or the circumstance of his retiring from practice, and leaving his place of business, with an imperfect adoption of some other medical attendant,[2] does not justify a reference to the latter alone; and should the party have no usual medical attendant at the time, he should state such to be the fact, as it would naturally lead to the question who had attended him last.

§ 317. As to *concealment* and *misrepresentation*, that portion of the declaration, by which the assured states that there is not within his knowledge any material circumstance or information touching his past or present state of health, or habits of life, with which the directors ought to be made acquainted, is not universally inserted by the offices. Its insertion is almost superfluous, for by the general law of insurance and the principles on which it is founded, the withholding of such information, even though the policy contained no such

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[1] Everett *v.* Desborough, 5 Bing. R. 503.

[2] Huckman *v.* Fernie, 3 M. & W. 505.

warranty, would annul the contract. This leads us to the consideration of the rule which exacts from the insured, as well as the agent[1] whom he employs to effect the insurance, an unreserved and full statement of all material facts, whether he is required by the insurers to give it, or not, unless they expressly dispense with it. An undertaking of insurance is considered by the law to be what it really is, a contract upon speculation, and in order to form a correct estimate of the risk incurred, and to compute accurately the compensation which ought to be paid for subjecting himself to it, a knowledge of all important facts is most essential to the insurer. From the nature of things, these almost invariably lie within the knowledge of the assured, and therefore the communication of every circumstance with which he is acquainted, material for the purpose of this computation, is most justly and wisely imposed as a positive duty upon him by the law. He is required[2] to act with the purest good faith, and even an excess of candor, and his omission to mention any fact which might fairly have influenced the judgment of a reasonable man in estimating the premium, or accepting the insurance, although it may have arisen from mistake or heedlessness, or from a *bonâ fide* belief that it was quite irrelevant, will be fatal. "The proper question," observes BAYLEY, J., "is whether any particular circumstance was in fact material, and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to show, that the party neglecting to give the information thought it material."[3] Neither is this duty confined to matters respecting which questions are addressed to the assured; the only limit which the law allows is his knowledge, and therefore he must even volunteer all the information he pos-

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[1] Fitzherbert *v.* Mather, 1 T. R. 12.

[2] Bufe *v.* Turner, 6 Taunt. 338; Williams *v.* Duckett, 6 Car. & P. 3; Rickards *v.* Murdock, 10 B. & C. 527; Dowdes. *ub. sup.*

[3] Lindenau *v.* Desborough, 8 B. & C. 592. See *ante*, Chaps. VII. & VIII.

sesses which is in any way material. The evasion of a question would obviously be a fraud, and a concealment might also amount to it, but much less than this will vitiate the contract. As Lord Lyndhurst expressed himself in summing up in one case to the jury, 'I do not choose to use the word *concealment*, as it may import fraud. The mere non-communication of the facts, if you are of opinion that they were material, will avoid the policy.'[1] The knowledge of the insured, however, is the limit, and it is not incumbent on him to procure the communication of every material fact, with which other persons may be acquainted. And hence when a person who effects an insurance on his life on his own account, or as the agent of another, has suffered from an attack of a serious disease, which it would be his duty under ordinary circumstances to mention to the insurers, from its peculiar nature, or otherwise, remains in ignorance of its real character, though that was evident to others, an omission to cause the office to be apprised of it will not, in the absence of any warranty, defeat their engagement. Thus, where Mr. Abraham had, in 1823, labored under delusions arising from incipient insanity, of which he *personally* was unconscious, but Dr. Burrows and Dr. Sutherland, who attended him, knew the cause, the fact of the insurers not having been informed of the circumstance, when an insurance was effected on his life, and he was examined in 1827, was held, even upon the assumption that he was the agent of the assured, a third person, for all purposes, not to vitiate the policy.[2]

§ 318. If a simple omission to state circumstances which would enable the insurer more accurately to estimate the risk, without reference to the motives of the assured, entails such a penalty, clearly the result should be the same, where he has either wilfully or innocently made erroneous statements as to

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[1] Williams *v.* Duckett, cited 6 Car. & Payne, R. 3, and 4.

[2] Swete *v.* Fairlie, 6 Car. & Payne, R. 1.

material facts, and caused the insurer to calculate his payment on a wrong basis. A representation, therefore, of material facts, which turns out to be incorrect, destroys the contract. In every species of contract, when a party has made a statement which he knew at the time to be false, and by means of it induced another to enter into an engagement with him, the latter may always avoid it. This right arises from the fraudulent nature of the act, and the wilful imposition which has been practised; but in insurances the question is not whether the person making it was aware of its inaccuracy, or the assured was guilty of fraud, but simply whether the statement was incorrect; and the most pardonable mistake will consequently discharge the insurer. A representation differs from a positive warranty only in this, that with respect to the latter the materiality or immateriality of the facts included in it is unimportant; with respect to the former, the insurance is not void, unless the fact misrepresented is material.[1]

§ 319. In a warranty, too, the statements must be *strictly*, in a representation they need only be *substantially* true. The law has most justly laid down this rule, for the assured should only positively aver facts, when they fall within his own personal cognizance, and if he has drawn an inference which the insurers would not have drawn, as either he or the insurers must suffer, and they would have just cause to complain, if they were compelled to bear a loss consequent upon his mistake, the law has very properly thrown the burden upon him. Hence, whenever the assured has not personal means of knowing facts which are material, he should either state the whole of what he has been told, as a matter for the accuracy of which he will not vouch, or, if he believes it, as a mere matter of belief. This course he may with safety adopt, for the law is not so unreasonable as at once to compel him to divulge all he is acquainted with, and to subject him to unavoidable

[1] See *ante*, § 147, *et seq.*

risk in doing so. Therefore, where a party stated that, from information he had received, *he believed* the life of the person he was employed to insure was a good life, but he would not warrant it, and it afterwards turned out that the party was at the time seriously ill, it was decided that as the agent had no reason to believe his statement to be incorrect, he was in no way to blame, and that the policy was good.[1] The only other question, where facts have been either omitted to be mentioned, or have been misrepresented, in the absence of actual fraud, is the materiality of them, and upon this point the jury are the sole judges.[2]

§ 320. The omission to state that the person whose life was insured in April, 1823, and who died of diseased lungs in April, 1824, had been twice alarmingly ill six months before the date of the insurance, and subsequently to those illnesses had become much emaciated, and suffered from a troublesome cough, for which she was attended by a medical practitioner who was not referred to, was deemed by the court such a matter as the judge ought expressly to have submitted to the jury, although she had apparently recovered before the making of the policy.[3] And it would appear from this and other cases,[4] that it is important the insurers should be enabled to make inquiries of the medical man who has last had the party under his care, and therefore if a medical man, who is not the usual medical attendant, has been in recent attendance, whether there is or is not a reference to the usual attendant in the declaration, an omission to communicate that fact would be fatal. In another case, where insanity was not mentioned in the declaration, but the person whose life was

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[1] Stackpole *v.* Simon, 2 Park, Ins. 932, 8th Ed.

[2] Huguenin *v.* Rayley, 6 Taunt. 186; Lindenau *v.* Desborough, 8 B. & C. 586; and *ante*, § 152 *et seq.* & 175, & 311 *et seq.*

[3] Morrison *v.* Muspratt, 4 Bing. 60.

[4] Maynard *v.* Rhode, 5 Dow. & Ry. 266; Everett *v.* Desborough, 5 Bing. 503.

insured had lost the use of his mental faculties, the non-communication of this circumstance was held to be an omission, which would have justified the jury in finding a verdict for the insurers;[1] and in a third, the false assertion of the insured, who was effecting an insurance for two years only, that she had not effected any other insurance, was considered a *mis*representation of a material fact.[2]

§ 321. That an unmarried woman had two years before become the mother of a child under circumstances of the grossest profligacy,[3] and that the party whose life was insured was at the time a prisoner for debt, and consequently debarred from air and exercise,[4] were in two other instances held to be fit subjects to be submitted to a jury. It may not too often be stated, that in the case of concealment or misrepresentation, as in the case of a *warranty*, the question of materiality is not regulated or determined by the event, and although the death may arise from a cause totally unconnected with the circumstances which have been omitted to be mentioned or have been misrepresented, the contract will equally be vitiated. Thus, for example, if the party whose life was the subject of the insurance, in the first case above quoted, had been killed within twenty-four hours after effecting the insurance by a thunder-storm, the policy would have been as unavailable,[5] as if it had occurred from the disease suppressed.

§ 322. There was an insurance made by a sister for five thousand dollars upon the life of her brother, J. B., aged thirty-three years, bound on a voyage to South America, or

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[1] Lindenau *v.* Desborough, 8 B. & C. 586. See also Swete *v.* Fairlie, 6 Car. & P. 1.

[2] Wainwright *v.* Bland, 1 Mood. & Rob. 478; 1 M. & W. 32.

[3] Edwards *v.* Barrow, Ellis, 116.

[4] Huguenin *v.* Rayley, 6 Taunt. 186.

[5] Maynard *v.* Rhode, 1 Car. & Payne, R. 360, cited by Dowdes.

any other place he might proceed to from Boston, commencing the risk on the 16th of December, 1809, at noon, and to continue until the 16th of July, 1810, at noon; for a premium of seven per cent., and the underwriter became obligated in the sum of five hundred dollars. The court held, that the utmost latitude was given to J. B., to go where he pleased, at all times, and imposed no restriction whatever upon him as to the place where he should exercise his industry and enterprise. By the court, — "Possibly, if he secretly intended, at the time the policy was subscribed, to visit some portion of the globe, where his life would be exposed to more than common hazard, and kept that intention concealed from the underwriters; had he been interested himself in the policy, or had his sister been privy to his intentions, and aided him in concealing them, such conduct might have been considered in the light of a fraudulent concealment; and if the fact were material, the contract might have been avoided. But the jury have found that there was no such concealment: and the objection now rests upon the supposed illegality of the enterprise in which he was engaged. It is a sufficient answer to this objection, that whatever the law may be as to an insurance upon an illicit voyage between the parties to the contract, the present plaintiff, being ignorant of an intended violation of the law, ought not to be affected by such illegality. Had the policy been effected by J. B. himself, it might be questionable whether, as the underwriters had excepted no particular employment, in which he might be engaged, and no cause of death but suicide and forfeiture of life for crime, whether his engagement in any traffic prohibited by law would have discharged their liability. If it would, it must only be because it might be thought just and legal to discourage contracts which might tend to uphold enterprises forbidden by the laws." [1]

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[1] Lord *v.* Dall, 12 Mass. R. 115. The court concluded their opinion as follows, — "Perceiving nothing in this contract unfriendly to the morals or interests of the community; and no knowledge of an illegal intention being

§ 323. A case which involved the question of an untrue statement or concealment, was the following, decided by the Supreme Court of Massachusetts:[1] — The plaintiff's intestate, on the 1st of December, 1848, applied to the defendants' agent at Springfield to obtain insurance on his life for $3,000, and signed an application for that purpose in the form prescribed by the company. The application contained various interrogatories relating to the circumstances, condition, and state of health of the applicant, to be answered by him; and the answers to which constituted the representation upon which the insurance was to be effected. One of these questions, the 9th, was: "Have the party's parents, brothers, or sisters, been afflicted with pulmonary complaints or consumption?" to which the applicant answered, that his mother and sister died of consumption. The 10th was: "Has the party or any of his family been afflicted with pulmonary complaints, consumption, or spitting of blood?" to which the intestate answered in the negative. Another, the 17th, was as follows: "Is the party now afflicted with any disease or disorder, and what?" To this the intestate answered: "He cannot say, that he is afflicted with disease or disorder, but at the present time is troubled with a general debility of the system." The last interrogatory, the 25th, which the applicant answered in the affirmative, was expressed in these terms: "Is the party aware, that any untrue or fraudulent allegation, or if there shall be any misrepresentation or concealment made in effecting the proposed assurance, it will render the policy void, and that all payments of premium made thereon will be forfeited?" In answer to the interrogatory inquiring "the name and residence of the applicant's usual medical attendant," or (if he had none) "of some other medical person to be referred to for information as to his health," the intestate gave the name of

imputed to the plaintiff, we see no reason for setting aside the verdict;" and the court refer to Marsh. on Ins. 3d Ed. 771, 776.

[1] Vose *v.* Eagle Life and Health Ins. Co., 6 Cush. (Mass.) R. 42.

Alfred Lambert, Springfield; and the name of R. E. Ladd, of Springfield, as "an intimate friend to be referred to for similar information." On receiving the application, the agent called on R. E. Ladd, to whom the applicant had referred, and on Dr. Lambert, his medical attendant. The latter not being at home, the agent, at the suggestion of Pease, called on another physician, Dr. Wood, who had sometimes been employed by the agent to make medical examinations for the defendants. Dr. Wood examined Pease the same day, in the agent's presence, and wrote and subscribed a certificate, which he delivered to the agent, as follows: "I hereby certify that I have examined George F. Pease. The organs of his chest give no indication of organic disease, the air passes through every part of his lungs freely. His physical appearance is good, and has no appearance of chronic predisposition. I consider him a good subject for insurance." The application and certificate were forwarded immediately to the directors of the defendants, and thereupon a policy was executed, dated on the same day with the application, and sent to the agent, who subsequently delivered it to the intestate, and received the premium for the first year. The policy contained a clause, declaring it to be made upon this express condition, "that said application forms a part and parcel of this policy, and if it shall be found, that the said application is in any respect untrue, or that there is any misrepresentation or concealment in the said application, then this policy shall be void and of no effect, and all the premiums paid thereon shall be forfeited to the said company." The arbitrators reported, that the plaintiff's intestate, at the time of making his application, was laboring under a tubercular consumption, the incipient symptoms of which had begun to develop themselves as early as the July previous, and that he died of the same disease in February, 1849: that he knew of symptoms in respect to himself, which ordinarily indicate the incipient stages and subsequent progress of such disease, at the time of and previous to making his application, but that he did not disclose the existence of these symptoms to the defendants' agent;

that when he made the application, the intestate did not believe he had such complaint, though he had reasonable cause to do so; and that the statement made by him was not intentionally false, but, according to his belief at the time, was true. The arbitrators also reported, that so many of the symptoms of the intestate's disease were known to the defendants' agent, before the policy was made and delivered, as to indicate to a man of ordinary intelligence, that he was laboring under disease of a pulmonary character; and that the agent had reasonable cause to believe that the intestate was laboring under a disease of that character. The arbitrators reported farther, that, so far as the intestate's application contained statements inconsistent with the fact, that, at the time of the application and the issuing of the policy, he was laboring under a pulmonary disease, which was incurable, and what is known as consumption, such statements were not true; and that if the court should be of opinion, that the policy and application amounted to a warranty, on the part of the intestate, that he was not then, and for some months previous had not been, laboring under the disease of consumption or pulmonary complaint, the arbitrators awarded and determined that the plaintiff had not sustained his action; but if the court should be of opinion, that the representations contained in the application, together with the policy, did not constitute a warranty, and should also be of opinion, that, upon the facts above stated, the defendants were liable, the arbitrators awarded and determined in favor of the plaintiff, for the amount due on the policy. By the Court, — "It is the duty of the insured to disclose all material facts within his knowledge. Although specific questions applicable to all men are proposed by the insurers, yet there may be particular circumstances affecting the individual to be insured, which are not likely to be known to the insurers; and the concealment of a material fact, when a general question is put by the insurers, at the time of effecting the policy, which would elicit that fact, will vitiate the policy. Applying these principles of law to the present case, and the conclusion is inevitable

that the plaintiff is not entitled to recover. Upon the facts in the case, it is not important whether the proposal or application is considered as a warranty or representation. As a warranty it was so manifestly untrue, and as a representation there was manifestly so material a misrepresentation, that in either view the policy is invalid. The fact is established, that at the time of making the proposal and issuing the policy, the insured was rapidly declining in a confirmed consumption, and had been so declining for five months previous, and continued to live but about two months after this time. Yet, in answer to the 10th interrogatory, the insured expressly denied, that he or any of his family had been afflicted with pulmonary complaints, consumption, or spitting of blood. In answer to the seventeenth interrogatory, the insured said that he could not say that he was afflicted with any disease or disorder. It is immaterial that the insured did not suppose himself in a consumption; the fact was so, and the statement was manifestly contrary to the fact, which was a most material and conclusive fact. The fact of the general debility of the system, stated by the insured, was not important in the manner in which it was stated; as it might arise from a variety of causes not materially affecting the risk, and would not, therefore, by any means, give the insurers the information wanted. The insured was asked directly, whether he was at the time affected with any disease or disorder, and what; to which he answered, that he could not say that he was afflicted with any disease or disorder; but he could have stated the symptoms of consumption, which he had, and which he knew he had, and which he had had for five months previous; and which were certainly most material and important to be known by the insurers. It is believed that omissions or concealments less important than this, and without any intentional fraud, have been held to avoid policies upon life. But it is not necessary to make this any part of the ground of the decision in this case; as the answer to the tenth interrogatory is so manifestly and most materially untrue, that whether regarded as a warranty or a representa-

tion it must avoid this policy. The knowledge, which the award finds that the defendant's agent had in regard to the situation of the insured, cannot be material. The agent did not and could not make the contract. He received the application, and forwarded it to the directors of the company at their place of business, and the contract and policy were there made and signed by the officers of the company wholly upon the basis of the application, which is expressly declared, both in the application itself and in the policy, to form a part of the policy. Both the application and policy are particularly explicit and strong in this respect. It is farther set out and declared in the application signed by the insured, that if any fraudulent or untrue allegation, misrepresentation, or concealment is contained in the proposal, all moneys which had been or might be paid on account of such assurance shall be forfeited to the said company, and the policy shall be void. The insured further declared in his proposal, that he was aware, that any untrue or fraudulent allegation, misrepresentation, or concealment, made in effecting the proposed insurance, would render the policy void, and that all payments of premiums made thereon would be forfeited. The instruments executed by the parties, in the present case, are certainly peculiarly strong and specific, binding the insured to the utmost care and caution in his statements and representations, and to the most careful and scrupulous disclosure of every thing material to the risk."

§ 324. As has been stated by Dowdeswell,[1] to the above rules respecting the non-communication and misrepresentation of material facts, there are three exceptions: "The first of these is where the insurers, before the execution of the policy, obtain by any means[2] an accurate knowledge of the facts withheld, or without fraud erroneously represented. In such a

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[1] On p. 50.

[2] See Carter *v.* Boehm, 3 Burr. R. 1910.

case, the reason for the rule of law ceases, inasmuch as *scientia utrinque par, pares facit contrahentes.* The second is where such facts would tend to diminish rather than to enhance the risk; and the third exception is where they only affect some fact included in a warranty, since whatever is comprised within that is, as it were, struck out of the risk, and ought not legitimately to form an ingredient in the calculation of the premium." [1]

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[1] See Haywood *v.* Rogers, 4 East, R. 590.

CHAPTER XVI.

OF ASSIGNMENT OF POLICIES OF INSURANCE UPON LIFE.

§ 325. It appears that there has never been any long continued doubt that a life policy is assignable;[1] and, as has been well observed, without the power to assign, "the insurance on lives would lose half its usefulness."[2] Such policies are assignable, though the question has been agitated in England, whether they are assignable under the statute which has been referred to of 14 Geo. 3, c. 48,[3] which requires an interest in the life insured. But Vice-Chancellor SHADWELL[4] held, that an assignment of a life policy, for a valuable consideration, is good, provided there be no objection to its validity at the time when the policy is effected; that if the party effecting the policy possess an insurable interest at that time,[5] that interest will be sufficient to support the policy in the hands of the assignee for valuable consideration, and he will be entitled to bring an action in his own name for the sum insured. In this case, one of the mesne assignments was voluntary, but valuable consideration had been given for it by a subsequent assignment.[6]

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[1] 1 Bell, Comm. 545.

[2] Ibid.

[3] See *ante*, § 297, and Ellis on Fire and Life Ins. 143.

[4] Ashley *v.* Ashley, 3 Sim. Ch. R. 151.

[5] As to the interest of the assured in Life Policies, see *ante*, Chap. XIV., and *ante*, § 211; Mackenzie *v.* Mackenzie, 5 Eng. Law & Eq. R. 67; Cook *v.* Black, 1 Hare, Ch. R. 390; Gingell *v.* Bean, 1 M. & Grang. R. 555.

[6] For Forms of a Life Policy, see Appx. pp. ix.–xvii., and for Heads of Indenture of Assignment of a Policy of Insurance upon Life, as a security for a debt, see Appx. p. xiv.

§ 326. By the terms of the assignment of a life insurance policy, the assignee was to receive the proceeds, and if other securities held by him were insufficient for that purpose, to apply the same to the satisfaction of his claims against the assignor, and to pay over the residue, if any, to the wife of the latter. The Chancellor of Maryland held, that upon the facts, there was such a consummate transfer and delivery of the policy in question, as took from the husband the legal power and dominion over it; that after he had assigned the policy by indorsement and delivery, for the purposes as were disclosed in the evidence, there no longer remained in the assignor any authority or control over it; and that the insurance company had full authority to pay the money to the assignee.[1] Still, the effect of this and the preceding decision

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[1] Harrison *v.* McConkey, 1 Johns. (Md.) Ch. R. 34. "This," remarked the Chancellor, "was not like the case of Pennington *v.* Patterson, 2 Gill & Johns. 208, and Bradley & wife *v.* Hunt, 5 Gill & Johns. 54, in which the legal power and dominion over the property in dispute remained, notwithstanding the acts done, by the alleged donors; but it is the case of an absolute transfer of the entire possession and title, leaving the party making the transfer no power whatever over the subject, and requiring nothing of him or his administrator to perfect it." In Palmer *v.* Merrill, 6 Cush. (Mass.) R. 282, a case of Life Insurance, Shaw, C. J., says, — "According to the modern decisions, courts of law recognize the assignment of a *chose in action*, so far as to vest an equitable interest in the assignee, and authorize him to bring an action in the name of the assignor, and recover a judgment for his own benefit. But, in order to constitute such an assignment, two things must concur: first, the party holding the *chose in action* must, by some significant act, express his intention that the assignee shall have the debt or right in question, and, according to the nature and circumstances of the case, deliver to the assignee, or to some person for his use, the security, if there be one, bond, deed, note, or written agreement upon which the debt or *chose in action* arises; and secondly, the transfer shall be of the whole and entire debt or obligation, in which the *chose in action* consists, and, as far as practicable, place the assignee in the condition of the assignor, so as to enable the assignee to recover the full debt due, and to give a good and valid discharge to the party liable. The transfer of a *chose in action* bears an analogy, in some respect, to the transfer of personal

is not such as can prevent questions being raised between the assignee and the office: they merely decide the assignee's right to bring an action.[1]

§ 327. Whether a right is secured by a *mere deposit* of a life policy, or by a *formal assignment*, it can make no difference; the effect in equity is to give the party taking the security all that an assignment would give him: the latter does, in fact, assign the benefit of the policy. A transaction, whereby the assured gives to a person lending money to him a right to the repayment of the money out of the money which is to become due in respect to a life policy, is in truth an assignment.[2] A policy of insurance upon the life of the party obtaining it, is *assigned as security*, with a covenant by the assignor that he will pay the premiums to the insurance company, and that, if he does not, it shall be lawful for the assignees to pay them, and recover the amount from the assignor, as money paid to his use; and the plaintiff declares against the defendant, in debt, reciting the deed, and alleging payment of a premium on default made by the defendant; whereby an action had accrued to the plaintiff. In such case, although the deed contained no express covenant that the defendant should, in any stated event, pay the amount of the premium, the action is maintainable.[3]

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property; there can be no actual manual tradition of a *chose in action*, as there must be of personal property, to constitute a lien; but there must be that which is similar, a delivery of the note, certificate, or other document, if there is any, which constitutes the *chose in action*, to the assignee, with full power to exercise every species of dominion over it, and a renunciation of any power over it, on the part of the assignor. The intention is, as far as the nature of the case will admit, to substitute the assignee in place of the assignor as owner." And see *ante*, § 211.

[1] Ellis on Fire and Life Ins. 143.

[2] Per Sir James Wigram, V. Chan., in Cook *v.* Black, 1 Hare, Ch. R. 393; and see Powles *v.* Innes, 10 M. & Welsb. R. 10; Wells *v.* Archer, 10 S. & Rawle, (Penn.) R. 412.

[3] Barber *v.* Butcher, 8 Adol. & Ell. R. 862; Ellis on Fire and Life Ins. Ch. V.; and see Appx. p. xiv..

§ 328. But in an action of assumpsit, in which it appeared that an assignment for a good consideration from the assured in a life policy, by an indorsement thereon in writing of the sum insured thereby, notice of which was given to the insurers, but the policy *remained in the hands of the assignor*, it was held, did not transfer to the assignee such an interest in the policy as entitles him, if the estate of the assured proves insolvent, to recover the whole sum assigned to him of the assured's administrator, who has received the whole amount of the policy from the insurers.[1] SHAW, C. J., who delivered the judgment of the court in this case, said, — "It appears to us that the order indorsed on this policy, and retained by the assured, fails of amounting to an assignment. We do not question that an assignment may be made of an entire fund, in the form of an order drawn by the owner on the holder of the fund, or party indebted, with authority to receive the property or discharge the debt. But if it be for part only of the fund or debt, it is a draft or bill of exchange, which does not bind the drawee, or transfer any proprietary or equitable interest in the fund, until accepted by the drawee. It therefore creates no lien upon the fund.[2] It seems to us quite clear, that the plaintiff acquired no such interest in this policy as would enable him to maintain an action against the insurers. He seems himself to have thought so too; for although he demanded the amount of them, which they refused to pay, for reasons which seem to be conclusive; he yet declined bringing any suit against them, but permitted them to pay the money over to the administrator. If the plaintiffs had no such legal or equitable interests in the debt due on the policy as would entitle him to maintain an action or suit in equity, either in his own name or the name of the administrator of

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1 Palmer *v.* Merrill. 6 Cush. (Mass.) R. 282.

2 Upon this point the learned judge considered that the authorities were decisive, and he cited Welsh *v.* Mandeville, 1 Wheat. (U. S.) R. 233; S. C. 5 Ibid. 277; Robbins *v.* Bacon, 3 Greenl. (Me.) R. 345; Gibson *v.* Cooke, 20 Pick. (Mass.) R. 15.

the assignor, for his own benefit, it seems difficult to perceive on what ground he had any equitable lien on the debt due by the policy; and if he had not, then the administrator took it as general assets, charged with no trust for the plaintiff." Were the law otherwise, "an administrator, instead of succeeding to the property and rights of his intestate, to be administered and distributed equally amongst all the creditors, might be obliged to dispose it in very unequal proportions, according to such supposed declaration of trust. These considerations apply with peculiar force to a policy of insurance on the life of the assured himself, on which no money can become due until the death of the assured, at which time all his rights devolve on his personal representative. If, therefore, it is intended to supersede the rights of the personal representative, it must be done in the mode required for a complete assignment of the whole contract." [1]

§ 329. In England, the practice of assigning life policies seems to have been quite common.[2] The case of Cook *v.* Black [3] is an important instance. A debtor in that case effected an insurance on his life, one condition of the policy being, that if it should be assigned *bonâ fide*, the assignee should have the benefit of it, so far as his interest extended, notwithstanding the assured should commit suicide. He deposited the policy with his creditor, accompanied by a letter, promising to assign it to him when requested, as a security for his debt. No notice of the assignment was given to the insurers.

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[1] The reporter of this case has added the following: "It having been suggested in the argument, that other facts existed, not appearing in the report, showing that the assignments had been delivered to the respective assignees, at the time the notice thereof was given to the company, and assented to by them, expressly or by implication, a new trial was granted, on which the plaintiffs obtained verdicts and judgment.

[2] Ellis on Fire and Life Ins. Chap. V.; Dowdeswell on Life and Fire Insurance.

[3] Cook *v.* Black, 1 Hare, Ch. R. 390.

The debtor committed suicide; and it was held, that inasmuch as the deposit of the policy and the agreement to assign it, by way of security for a debt, contained in equity a valid assignment, as between the parties to the transaction, it was also an effectual assignment within the condition as against the assurers. "The meaning of the condition," said Vice-Chancellor WIGRAM, "is, that the assured shall have the power of assigning the policy so effectually, that a person advancing money upon it shall retain his security unimpaired, notwithstanding the assured might commit suicide; and by this condition the policy is rendered more valuable as a negotiable security."

§ 330. An assignee of a life policy cannot recover upon it, unless the assured had a *pecuniary* interest in the life insured, which is necessary to render the policy valid;[1] so that a policy effected by a father in his own name on the life of his son, he not having such interest therein, is void.[2] By BAYLEY, J.: "Now what was the amount or value of the interest of the party insuring in this case? Not one farthing, certainly. It has been said, that there are numerous instances in which a father has effected an insurance on the life of his son. If a father, wishing to give his son some property to dispose of, make an insurance on his son's life in his (the son's) name, not for his (the father's) own benefit, but for the benefit of his son, there is no law to prevent his doing so: but that is a transaction quite different from the present; and if a notion prevails that such an insurance as the one in question is valid, the sooner it is corrected the better."

§ 331. Although a contract between A and B may resemble an insurance on the life of C, where A advances money for a benefit to be received from B upon his death, yet it may

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[1] See *ante*, § 297, 298.

[2] Halford *v.* Kymer, 10 B. & Cress. R. 724.

have circumstances which are not incident to a life insurance. The intention of B is to obtain a present sum of money; the intention of A is to obtain from B the assignment of an expected devise, and, if there should not be such a devise, a repayment of the money without interest. The death of C is made important only for the purpose of ascertaining whether there be or be not the expected devise. This contract would not be commonly understood to be a policy on the life of C, and, therefore, would not be a wagering policy prohibited by the statute above mentioned,[1] of 14 Geo. 3, c. 48, or otherwise. On the other hand, if it is correctly called an insurance upon life, it is not without an interest within the meaning of the above-named statute; for although B has no vested interest in the property of C which he could sell, still, a promise to assign a devise, which he expected, would be a sufficient consideration to support a promise to pay for it, in a contract not under seal; and the purchaser of such an expected devise would have an interest so far as to prevent his policy from being considered a gaming or wagering policy.[2]

§ 332. Among the trusts of a settlement, (the subject of the settlement being property limited to the separate use of the wife,) it was provided that the trustees should effect a policy of insurance to a given amount on the life of the wife, and annually pay the premium out of the trust money during the life of the wife, and stand possessed of the insurance in trust after the decease of the wife, to invest the sum insured when received, and pay the interest to the husband for his life, if he should survive the wife, and after the decease of the husband to pay the said amount insured to such person or persons as the wife should, by will, notwithstanding her coverture, appoint; and in default of such appointment, to the

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[1] See *ante*, § 297.

[2] Per Lord Campbell, C. J., in Cook *v.* Field, 15 Adol. & Ellis, R. (N. S.) 460.

persons entitled under the statute of distributions. There were no children by the marriage, and the wife, having survived the husband, and being unwilling to continue the payment of the annual premium, joined with the surviving trustee of the settlement in making a *voluntary assignment* of the policy to her cousin, who paid the annual premium during his life, and by his will appointed G. his executor and residuary legatee. G. continued to pay the premium, and, on the death of the assured, received the value of the policy. It was held, on a bill in equity filed by the next of kin of the wife against G., and against the executor and residuary legatee of the wife, that the assignment was valid, and that G. was entitled to the value of the policy. By Lord LANGDALE, Master of the Rolls, — "The trustees held the policy, and were the legal owners of it. They had, by conveyance and assignment, the life-estate, and by agreement between the husband and wife they were to pay the premiums upon the policy during the life of the wife; and, if the husband had survived the wife, or if the wife surviving had permitted the premiums to be paid, there would have been no doubt as to the persons entitled to the money payable on the policy. But the whole provision is founded on the agreement between the husband and wife: except by stating the agreement to be so, there is no declaration of trust, and there is not even a covenant on the part of the trustees. The case appears to be a case of mixed trust and agreement, and looking at the whole of the settlement, I think that the intention of the ultimate limitation in the clause in question, considered in connection with the rest of the deed, was only to show that the agreement was to exclude the husband from taking more than a life-interest in the investment of the policy money otherwise than by the gift of the wife, and that from the nature of the clause considered as an agreement, it was open to the husband and wife during their joint lives, and to the wife if she survived, to alter that which was intended only for their mutual benefit; and it appears to me that, if the surviving trustee had availed himself of his power as trustee, and insisted on paying the premiums against the

will of the widow, she might have compelled him to pay the whole income to her, and that this court would not have considered her bound to perform the agreement for the benefit of mere volunteers. Thinking that she had a right to refuse to keep up the policy, or to permit the trustee to keep it up, I think that the trustee was entitled to assign it according to her direction." [1]

§ 333. According to Ellis,[2] although, as a general rule, a life insurance company will pay the amount of the policy to a third person, who has *bonâ fide* advanced his money and taken that security, and that they should be assignable *without notice* to the insurers, (though notice is required in fire policies);[3] yet as between encumbrancers, or against assignees in *bankruptcy* or *insolvency*, notice becomes a matter of importance in a life insurance.[4] The American jurisprudence, says Mr. Phillips,[5] has not yet settled the principles on which the assignment of *such* policies is to be regulated.[6]

§ 334. The beneficial interest in a policy is also capable of

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[1] Godsal *v.* Webb, 2 Keen, Ch. R. 99. The case of Anderson *v.* Dawson, 15 Ves. Ch. R. 552, differs considerably from this in the circumstances. And see Fortescue *v.* Burnett, 3 Mylne & K. Ch. R. 106; Courtner *v.* Ferrers, 1 Sim. Ch. R. 137.

[2] Ellis on Fire and Life Ins. 152, 153.

[3] As to the necessity of notice in Fire Policies, *ante*, Chap. IX., §§ 199, 200.

[4] Cook *v.* Black, 1 Hare, Ch. R. 39; Vacher *v.* Cocks, 1 Barn. & Adol. R. 145.

[5] 1 Phill. on Ins. p. 60, 3d Ed.

[6] Mr. Ellis, *ub. sup.*, gives his reason, that life policies should be assignable without notice, that it is desirable, on the part of the holders, that such policies should be used as a means of credit, and he supposes it to be desirable, on the part of the holders, to be able to assign without a publicity that impairs their credit. Mr. Phillips (1 Phill. on Ins. p. 60,) is of opinion that this does not seem to be a very strong reason for a distinction between the assignment of a life policy, and any other. But see *ante*, § 200.

being bequeathed, and the conveyance or bequest of the principal sum will operate to transfer all sums accruing upon it, notwithstanding they may exceed considerably the original amount insured, unless words indicative of a contrary intention are contained in the instrument.[1]

§ 335. Upon the transfer of a policy, the delivery of the policy itself should be required, and notice should immediately be given to the insurers, not merely with a view to prevent the operation of any subsequent assignment to a purchaser, who would acquire a preferable title if this precaution of notice were neglected, and he remained in ignorance of the former transaction,[2] but also to prevent the assignor or his representatives from receiving the sum or giving a release,[3] which, in the absence of notice, might discharge the insurers.

§ 336. Notice to the insurers is clearly necessary to obviate the effect of those clauses in Bankrupt and Insolvent Debtors' Acts which vest in the assignees all the property, including securities of this nature,[4] that may happen, with the consent and permission of the true owners, to be in the order and disposition of persons coming under the operation of those statutes, and of which they may have the reputed ownership at the time of their bankruptcy or insolvency.

§ 337. In prudence no time should be lost in communicating to the office the fact of an assignment, but a previous act of bankruptcy will not now annul the effect of the notice, if the transferree was not aware of its having been committed when the notice was given, and a fiat has not in fact been issued.[5]

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[1] Courtney *v.* Ferrers, 1 Sim. Ch. R. 137; Parkes *v.* Bott, 9 Sim. Ch. R. 388.

[2] Dearle *v.* Hall, 3 Russ. 1.

[3] Gibson *v.* Winter, 5 B. & Ad. 96; Williams *v.* Thorpe, 2 Sim. 257.

[4] Schondler *v.* Wace, 1 Camp. 487; Williams *v.* Thrope, Sim. Ch. R. 257; West *v.* Reid, 2 Hare, 249; *Ex parte* Price, 13 Law J. Rep. Bank N. S. 15.

[5] *In re* Styan, 1 Phillips, Ch. 105.

§ 338. It is not requisite that the notice to be given to the insurers should be a regular and formal notice: thus a letter to the secretary of an insurance company, in which the writer stated himself to be the holder of certain policies,[1] and inquired what the company would give for them, was held to be sufficient. A verbal notice too is enough, even although it be not given for the purpose of completing the title.[2] The notice, however, should convey such a distinct intimation of the change of interest, as would in equity render the company liable to pay the money over again, if they had after the receipt of the notice paid the assured or his representatives. Affording them merely the means of ascertaining the fact is certainly not enough, and therefore where the assured assigned his policy to W., who was a member of the firm of C. & W., solicitors, as trustee for a third person, their client, and thereupon a communication was made to the insurance company, the particulars of which could not be shown, but a memorandum was entered in their books opposite to the declaration made when the insurance was effected, as follows, "Letters to C. & W., Chancery Lane, by Mr. C.'s order," and C. & W. paid the premiums, it was held that no sufficient notice was proved, and that the assignees of the assured, who had become bankrupt, were entitled to the amount of the policy.[3] Upon the same principle, in order to render it operative, the notice should be given to some member or officer of the company, who may reasonably be presumed to have authority to receive it on their behalf. The bare knowledge of the transfer by a person, who, in his capacity as one of the assured has become a member of a mutual insurance society, will not avail, at all events if he be the person effecting the transfer;[4] and where the assignee of a policy sent an agent to pay the premium, who in the course

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[1] *Ex parte* Stright, 2 Deac. & Ch. R. 314.

[2] Smith *v.* Smith, 2 C. & M. 231.

[3] West *v.* Reid, 2 Hare, 249.

[4] Thomson *v.* Speirs, 13 Sim. 469.

of conversation with one of the clerks in the office told him of the assignment, this was held not to be a valid notice to the company.[1]

§ 339. This would, however, form an item of evidence on the other branch of the question as to reputed ownership; for the object of these clauses in the statutes being principally to prevent traders and others from obtaining credit by means of the apparent possession or control over property which does not really and substantially belong to them, wherever it has become notorious that the property was not in reality their own, their provisions do not apply. Any acts, consequently, by which a general understanding that the property belonged to the bankrupt or insolvent can be negatived, ought to be submitted to a jury upon the question of reputed ownership, and therefore, when, in addition to the mention of the transfer to a clerk, that fact was noticed in a statement of the assets laid before a meeting of creditors previously to the bankruptcy of the assured, and upon the trial of an action for the recovery of the policy by the assignees, the judge omitted to leave these circumstances to the jury, a new trial was awarded.[2]

§ 340. The execution of the deed of assignment transfers the beneficial property between the parties, though the policy itself be not delivered over,[3] and the mere deposit of the policy[4] with a verbal agreement for an assignment, or even the latter alone[5] as a pledge for a valuable consideration, will entitle the transferree to avail himself of the policy, as against the assured, and if proper notice has been given him, against his

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1 *Ex parte* Carbis, 4 Deac. & C. 354.
2 Edwards *v.* Scott, 1 M. & G. 962.
3 Fortesque *v.* Barnett, 3 M. & K. 36.
4 *In re* Styan, 1 Phillips, 105.
5 Tibbitts *v.* George, 5 Ad. & E. 107.

assignees under a bankruptcy or insolvency. Moreover, if the policy has been deposited with a third person, merely as a security, and without notice to any party, it would appear that the assignees in bankruptcy cannot bring an action for the recovery of the instrument itself, for that was not in the order or disposition of the bankrupt, whatever may be their rights as to recovering the amount from the insurers when it becomes due.[1] Should the purchaser unfortunately have omitted to take the necessary steps in order to prevent the operation of these enactments, he may nevertheless, in any action at law[2] which the assignees may institute to recover the amount, after it has been received by him, deduct the sums he has paid by way of premiums to keep the policy alive; and in any suit in equity or proceeding in bankruptcy commenced by them, the court will give him a lien on the policy to the same extent.[3] A volunteer, who in the absence of any assignment from, or contract with, the person entitled to the policy, upon his declining to keep it up, comes forward and pays the premiums, acquires only a title of the like limited nature, and therefore, after deducting the sums he may have expended, and interest upon them, he will be compelled to pay the surplus to the original owner."[4]

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[1] Gibson *v.* Overbury, 7 M. & W. 555.

[2] Schondler *v.* Wace, 1 Camp. 487; Gibson *v.* Overbury, 7 M. & W. 559.

[3] West *v.* Reid, 2 Hare, R. 249.

[4] Burridge *v.* Row, 1 Y. & C. V. C. 183; S. C. 13 Law J. Rep. C. C. 173. The following are the views with respect to the assignment of both fire and life insurance policies, expressed by an English author, who has lately given to the public a work treating of them: — "By custom of marine insurance, policies are transferable with the bills of lading. There is no custom, however, recognized, which makes policies of fire and life insurance pass current to successive owners of the property insured, nor to other persons, by transfer merely of the possession of the policy. As a general rule, where the possession of property is in one party, and an acknowledged claim to it resides in another, such claim can only become a transferable interest by the possessor being a party to the transfer by some act or admission; his ac-

ceptance of the notice of transfer is sufficient for this purpose. On this general principle, several cases upon policies of *life* insurance have been determined. An equitable mortgagee can assign; and an action of trover for detention of deeds does not lie. But not so when a depositee only holds for safe custody without lien. On fire insurance, no case of transfer of policies has come within the courts within a recent period (see *ante*, Chap. IX). Whether with regard to both or either of these kinds of insurance a custom will grow up, making policies of insurance to 'run with' the property insured, as custom has made several covenants (originally only personal contracts) to 'run with the land,' is a fair subject for conjecture. In a work recently published on Insurance, [see *ante*, Introd. § 11,] it is stated that the mercantile world are not satisfied with the decisions of the courts against the free transferability of policies. Perhaps the decisions are sound in principle, and custom alone can give new properties to policies, separating them from bonds, trusts, covenants, and other *choses in action*, [see *ante*, Introd. § 1, and § 199 of the Treat.] From a regulation of the West of England Insurance Company, which does away with the requirement of a notice to the office of any assignment of policies, it would appear that the practice of giving notice is thought objectionable by some, who do not like disclosure of assignments of their property; the prospectus accordingly states, that assignments shall be valid without notice." James, *Life and Fire Ins.* 73. (London, 1851.)

CHAPTER XVII.

OF THE CONSUMMATION AND DURATION OF THE CONTRACT OF LIFE INSURANCE.

§ 341. THERE seems to be no good reason why the established construction of law in respect to the consummation and duration of the contract of fire insurance, which has been elaborately considered in a former chapter,[1] should not apply to the contract of insurance upon lives.[2] By having recourse to the chapter referred to, the reader will perceive, 1st, that when a fire policy has been executed in conformity to the terms agreed upon, the contract is complete, though there has been no actual delivery of the policy to the assured;[3] 2dly, that immediate effect is to be given on a *mere agreement* to insure, and much insurance by such an agreement (and especially with a receipt of premium) has been effected; the contract may in the first instance be only executory, it being executed when drawn up in due form; the design being to supply the place of a formal policy, until such instrument can be prepared;[4] 3dly, that a special writing even signed by the

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[1] *Ante*, Chap. III., p. 67.

[2] "The same principles," says Professor Greenleaf, "course of proceeding, defences, and rules of evidence, are applicable here, (*i. e.* Insurance upon Lives,) as in policies on other subjects which have been already considered." 2 Greenl. Ev. § 409. Ellis on Fire and Life Ins. p. 161, says, — "The general principles of proceedings on policies against fire, are applicable to those on policies upon lives."

[3] *Ante*, § 31 – 33.

[4] *Ante*, § 33 – 39, 50. A promise to procure an insurance to be effected, makes the party promising liable in case of loss without an insurance having been effected according to the promise. Wilkinson *v.* Coverdale, 1 Esp. R. 75; Wallace *v.* Telfair, 2 T. R. 188 *n.*

parties is not absolutely required to complete the contract of insurance; and that the contract may be and has been frequently consummated, and made mutually obligatory, by a *correspondence by letter* between the person proposing for an insurance and the insurer; such correspondence satisfactorily disclosing the fact, that the minds of the two parties *have met.*[1]

§ 342. In respect to the DURATION of a policy upon a life: The ultimate limit of the risk is the event of the death of the party insured;[2] and the loss thereby is always a total loss, so that the full sum insured is to be paid; not so in a policy against fire.[3]

§ 343. Whenever it is a condition of a life policy, that the insurance shall not commence before the premium is actually paid; this is waived by the issuing of a policy by the insurer before payment. The annual premiums must be paid in the succeeding years, on the day of the month on which the policy was executed, or bears date. If it be declared by the insurer, that *fifteen days* beyond the expiration of the year shall be allowed for the payment of the next annual premium, if a loss happens within that number of days, the policy will be continued if the premium is paid before such time elapses, though a loss may have taken place after the year has expired.[4] But otherwise if a loss happen, and the premium is not paid within the fifteen days.[5]

§ 344. Upon a policy of insurance on the life of A, the pre-

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[1] *Ante*, § 39–50.

[2] 1 Phillips on Ins. p. 520, sec. 950.

[3] 1 Bell, Comm. 546; Beaum. on Fire and Life Ins. 56, and see *ante*, Chap. XI., "Of the Adjustment and Settlement of Loss," in Fire Policies.

[4] 1 Phillips on Ins. p. 520, 521, sec. 952, and *ante*, § 51; McDonnell *v.* Carr, Hayes & Jones, R. (Irish) 257.

[5] Ibid.; Mutual Ins. Co. *v.* Ruse, 8 Georgia R. 534.

mium became due on the 15th of March, but was not paid until the 12th of April, when the country agent of the insurance company, through whom the insurance had been effected,[1] gave a receipt for the amount of the premium. The instructions given by the company to the agent were, that the premium on every life policy must be received within *fifteen days* from the time of its becoming due; if not paid within that time, that he was to give immediate notice to the office of that fact, and in the event of his omitting to do so, that his account would be debited for the amount, after the fifteen days had expired. No notice was given to the company of the non-payment of the premium within the fifteen days; it was, therefore, entered in their books as paid on the 15th of March, and the agent was debited. It was held, first, that the mere debiting the agent with the premium could not be considered as a payment to the company by the assured; secondly, that as the agent had no authority to contract for the company, the fact of his receiving the money after the expiration of the fifteen days, and the entry in the company's books, debiting him with the amount, were no evidence of a new agreement between the company and the assured. The provision that the agent should be debited as if the premium was paid, was to operate as a penalty on him; but did not authorize third persons to take advantage of that which was a mere private arrangement between the company and the agent, for the purpose of insuring the due payment of all moneys which were to be received by him; it was simply the company's mode of keeping their own agents in order, by holding over them *in terrorem* that they should be responsible for the amount of money not received.

§ 345. Where in a policy for life or years there is a clause that the policy is to cease unless the premium is paid within a certain time, the assured dying within that period, but without

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[1] Acie *v.* Fernie, 7 M. & Welsb. R. 151.

paying the premium, a tender of the sum by his executor, though within the time limited, will not be a compliance with the clause in the policy. Thus, where one as a member of a life insurance society, for the benefit of widows and female relations, entered into a policy of insurance with the society for a certain annuity to his widow after his death, in consideration of a quarterly premium to be paid to the society during his life, and the society covenanted to him and his executors, &c., that if he should pay to their clerk the quarterly premiums on the quarter days during his life, and if he should also pay his proportion of the contributions, which the members of the society should during his life be called on to make, in order to supply any deficiencies in their funds; then on due proof of his death, the society engaged to pay the annuity to his widow, and by the rules of the society, if any member neglected to pay up the quarterly premiums for *fifteen days* after they were due, the policy was declared to be void unless the member (continuing in as good health as when the policy expired) paid up the arrears within six months, and five shillings per month extra; it was held, that a member insuring, having died, leaving a quarterly payment overdue at the time of his death, the policy expired, and that a tender of the sum by the member's executor, though made within fifteen days after it became due, did not satisfy the requisition of the policy and the rules of the society, which required such payment to be made by the member in his lifetime, continuing in as good health as when the policy expired.[1]

§ 346. We have seen that a difference at one time existed in England between policies expressed to be granted for a certain period "from the day of the date," and "from the date." It is now settled that the words, "from the day of the date," and "from the date," mean the same thing, and that they are to be taken as *inclusive* or *exclusive*, according to the con-

[1] Want *v.* Blunt, 12 East, R. 183.

text or subject-matter.[1] If the risk is described to commence "on" a certain day, it extends to all losses happening during any part of that day.[2] A policy takes effect in relation to the day of its date, though not delivered until afterwards.[3]

§ 347. A question might arise, says Beaumont,[4] "in case a year of general sickness should occur, whether the insurers have the power to consider the contract as renewed from year to year, and whether, therefore, they are at liberty to determine the contract within any year, (making compensation,) or to increase the premium payable at the expiration of the current year." He then proceeds, — "The existence of an insurance company, and thereby the welfare of the whole body of the insurers, might depend on such a power being conceded to the insurers. No such occasion, however, has yet arisen in the annals of life insurance. We may, therefore, consider, on the question of the *duration* of policies, that this is the conclusion . . . In fire insurance, the policy is for a special period of months or years, if so set forth, or it is for a year renewable continually for a year, with power in the directors to determine the insurance after any year, upon due notice; and as to life policies, they are limited for the period absolutely which is named in the policy."

§ 348. There is a modern case in Chancery, where an attempt was made, in a contract for purchase of a reversion, to fix the value of the expectancy of a man of sixty years of age, and bachelor dying without lawful issue. The court determined that such an event could not be the subject of calculation.[5]

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[1] See *ante*, § 53; Pugh *v.* Duke of Leeds, Cowp. 714; 1 Phill. on Ins. p. 500, sec. 921.

[2] 1 Phill. on Ins. *ub. sup.*

[3] Ibid. p. 501, sec. 922, citing Lightbody *v.* North American Ins. Co. 23 Wend. (N. Y.) R. 18.

[4] Beaum. on Fire and Life Ins. 13.

[5] Baker *v.* Bent, 1 Russ. & M. Ch. R. 224.

§ 349. Life policies may be taken out for any uncertain periods which can be reduced to a value by the calculation of probabilities proceeding on sufficient data.[1]

§ 350. Insurance upon lives, differently from all other insurances, become more valuable the longer they subsist, because the life insured is continually running out, and the premium of a new insurance would of course be higher.[2] If a debtor has opened a policy on his life, and assigned it in security, there can be no ground for pleading the extinction of the policy by the payment of his debt; for the benefit of the insurance belongs to him whose life is insured, after the burden of the security is extinguished, and he may make it the means of credit on another occasion, or dispose of it by settlement, or otherwise. But if a policy has been opened by a creditor, for the interest which he has in his debtor's life, it would seem that, with the payment of the debt, the interest would expire, and hence the policy would become void.[3]

§ 351. In order to render the insurers upon a life liable, the event of death may happen within the time prescribed by the policy, and as a doubt may exist whether the person upon whose death the liability depends is dead, a question of fact may be raised, to be determined by the jury.[4] All the author-

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[1] See Tables in the Appx.

[2] Bell, Comm. 545.

[3] Ibid. 545, 567. And see *ante*, § 304, 305, and Chap. XVI. of the Assignment of Life Policies.

[4] A case of recovery of the amount of $5,000 life insurance is recorded in the Louisville Courier of November, 1853. In the winter of 1848, Rev. Thomas Waring very mysteriously disappeared, near Elizabethtown, Hardin county, Kentucky, and was then, and still, believed by his relatives and friends to have been murdered. Some year or more before the death of Mr. W., he had effected an insurance on his life, in favor of his wife, in the Nautilus Mutual Life Insurance, of New York, for $5,000. In January last, suit was instituted in Jefferson Circuit Court by Mrs. Waring, for re-

ities concur in stating the rule of the common law to be, that the presumption of life, with respect to persons of whom no account can be given, ends at the expiration of *seven years* from the time they were last known to be living; and that, after which period of time, the burden of proof is devolved on the party insuring the life of the individual in question.[1] The

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covery of the sum insured, and on Friday morning, after a trial of two days' length, the case was submitted to the jury, who, in ten minutes after their retirement, returned a verdict for Mrs. W. for $ 5,000, with interest from the commencement of the suit. The result of this trial will be hailed with delight by the numerous friends and relations of that reverend gentleman, as furnishing a complete vindication of his memory. One of the points relied upon by the defence was that he was not dead, but had absconded. The whole case turned upon the question of his death. The defence was prepared with care, and presented with ability, by experienced counsel; yet the jury, after considering all the proof adduced on both sides, solemnly determined that the calumnies sought to be cast upon the memory of the dead are untrue, and that the beneficiary is entitled to the provision the forecast of her husband had made for her.

[1] The rule is thus briefly and perspicuously stated by Professor Greenleaf, (2 Greenl. Ev. § 278 *f*,) who refers to his Vol. I., § 41; Best on Presumptions, § 140; Hubback on Succession, p. 170–173; Thorne *v.* Rolff, Dyer, R. 185 *a*; Gilleland *v.* Martin, 3 M'Lean, (Cir. Ct.) R. 490; Doe *v.* Jesson. An insurance was made on the life of L. M. from the 30th of January, 1778. In an action on the policy, it appeared that about the 20th day of November, 1777, he sailed from the Cape of Good Hope, in the Swallow sloop of war; which ship, not being afterwards heard of, was supposed to have been lost in a storm off the Western Islands. The question was whether L. M. died before the 30th of January, 1778. To establish the affirmative of that question, the plaintiff called witnesses to prove the ship's departure from the Cape with L. M.; and several captains swore that they sailed the same day; that the Swallow must have been as forward in her course as they were, on the 13th or 14th of January, the period of a most violent storm, in which she was probably lost; and that the Swallow was much smaller than their vessels, which with difficulty weathered the storm. Lord Mansfield, who tried the cause, left it to the jury to say, whether, under all the circumstances, they thought the evidence sufficient to convince them that L. M. died before the time limited in the policy; adding that if they thought it so doubtful as not to be able to form an opinion, the defend-

issue in such case being an issue in fact, the jury are at liberty to find the fact of death within the period of *seven years*, upon the circumstances proved in the case. The circumstances which have been stated to be material to this issue, are the age of the party, his situation, habits, employment, state of health, physical constitution; the place or climate of the country; whether he went by sea or land; the facilities of communication between that country and his former home; his habit of correspondence with his relatives; the terms of intercourse upon which he lived with them; in short, any circumstances tending to aid the jury in finding the fact of life or death.[1] All these circumstances have been stated by Professor Greenleaf as material.[2] There must also be evidence, that learned author proceeds to say, of diligent inquiry at the place of the person's last residence in this country, and among his relatives, and any others who have probably heard from him, if living; and also at the place of his fixed foreign residence, if he was known to have had any. In Loring *v.* Steinman, in Massachusetts,[3] SHAW, Ch. J., in giving the judgment of the court, says: — "It is a well settled rule, that upon a person's leaving his usual home and place of residence for temporary purposes of business or pleasure, and not being heard of, or known to be living, for the term of seven years, the presumption of life then ceases, and that of his death arises. This presumption is greatly strengthened when the departure of an individual was from his native place, the seat of his ancestors, and the home of his brothers and sisters, and family connections; and still further when it was to enter upon the perilous employment of a seafaring life, and when he has not been heard of, by those who would be most likely

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ants ought to have their verdict; and the jury found for the plaintiffs. Patterson *v.* Black, Park on Ins. 433, 434, (2d Am. Ed.)

[1] White *v.* Mann, 13 Shep. (Me.) R. 361.

[2] 2 Greenl. Ev. § 278 *f.*; McCartee *v.* Camel, 1 Barb. (N. Y.) Ch. R. 455.

[3] Loring *v.* Steinman, 1 Met. (Mass.) R. 204.

to know of him, for upwards of thirty years. All these circumstances concur in the present case, and the court are all of opinion that they go fully to establish the fact of the death." [1]

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[1] See Smith *v.* Knowlton, 11 N. Hamp. R. 191; Doe *v.* Nepean, 5 Adol. & Ell. R. 86. It has been enacted by statute in the State of New York, that, "If any person upon whose life any estate in lands or tenements shall depend, shall remain beyond sea, or shall absent himself in this State or elsewhere, for *seven years* together, such person shall be accounted naturally dead, in any action concerning such lands or tenements in which his death shall come in question, unless sufficient proof be made, in such case, of the life of such person. 2 N. Y. Rev. Stat. 34, § 6. But the only presumption arising from such a protracted absence is, that the absentee is dead, if he has not been heard from within the seven years; not that he died at any particular time within the seven years, or even on the last day of that term. But where a person, whose existence is in question, has remained beyond sea for seven years, if he had a house and fixed place of residence in a foreign country when he was last heard from, he ought not to be presumed to be dead, without some evidence of inquiries having been made for him at such known place of residence, and without success. McCarter *v.* Camel, 1 Barb. (N. Y.) Ch. R. 455. It was held in this case, that where one of the next of kin of the decedent, and who was entitled to a distributive share of his estate, left her domicil of origin in the city of New York, and went to reside at a place near the city of Baltimore, and continued to correspond with her mother and sisters in the city of New York, but had not answered their letters for about twelve years previous to the death of the defendant, and there was nothing else to raise a legal presumption of her death; it was held, that the administrator of the decedent was not authorized to pay the share of the estate belonging to the absentee to her sisters, without making inquiries at the last known place of residence of the absentee, to ascertain whether she was living or dead. The English rule, that in the case of an absent person of whom no tidings are received, the presumption of the continuance of life ceases at the end of *seven years*, is adopted in the State of Pennsylvania; but the presumption of death, as a limitation of the presumption of life, must be taken to run exclusively from the termination of the prescribed period; so that the jury are bound to presume that the person lived throughout the *whole* of that period, unless there are circumstances in evidence to quicken the time; and the circumstances which are sufficient to take a case out of the operation of the rule, must be such as show that the

§ 352. If a married woman procures a policy of insurance upon the life of her husband, in her own name, and for her sole use, (as authorized by an act of the legislature,) the insurance money being made payable to her children in case she should die before her husband, and subsequently both husband and wife and their only child perished at sea, by the same disaster, and probably at the same moment; the act of the legislature does not extend to the case; and the insurance contract stands upon the same footing as any other contract made by a *feme covert* in her own name, in the lifetime of her husband, and without the intervention of a trustee. There being no evidence of survivorship, there is no legal presumption that the daughter survived the mother.[1]

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individual was at some particular date in contact with a *specific* peril. Burr *v.* Sim, 4 Whart. (Penn.) R. 150; Bradley *v.* Bradley, Ibid. 173. The same in Georgia, Doe *v.* Flanagan, 1 Kelly, (Ga.) R. 538, and in Maryland, Tilly *v.* Tilly, 2 Bland, (Md.) Ch. R. 445.

[1] Moehring *v.* Mitchell, 1 Barb. (N. Y.) Ch. R. 264. It seems that where husband and wife perish together at sea, and where there is no evidence to authorize a different conclusion, it will be presumed that the husband survived the wife. *Ibid.* This point, though raised, was not disposed of. The question first arose in the common-law courts in a motion for a *mandamus*, in the case of General Stanwix, (Rex *v.* Dr. Hay, 1 W. Bl. R. 640,) but the point was not decided (1 Greenl. Ev. § 30.) Afterwards in Chancery, when the Master of the Rolls refused to decide the question by presumption, and directed an issue, to try the fact by a jury. (*Ibid.* citing Mason *v.* Mason, 1 Merivale, Ch. R. 308.) Professor Greenleaf is of opinion that, "In the absence of all evidence of the particular circumstances of the calamity, probably this rule [the presumption that both perished together] will be found the safest and most convenient," and he cites Coye *v.* Leach, 8 Met. (Mass.) R. 371. The learned Professor adds, — "But if any circumstances of the death of either party can be proved, there can be no inconvenience in submitting the question to a jury, to whose province it peculiarly belongs." 1 Greenl. Ev. § 30.

FIRE AND LIFE INSURANCE.

CHAPTER XVIII.

OF THE PROCEEDINGS AT LAW ON POLICIES OF FIRE AND LIFE INSURANCE.

§ 353. What are the general principles of legal proceeding on policies against fire, are applicable to those on policies against lives.[1] The same principles, course of proceeding, and rules of evidence, says Professor Greenleaf,[2] are applicable to policies upon lives as in policies on other subjects. In regard to the arrangement of the work of Beaumont on Fire and Life Insurance, that author says, that he "found it impossible to give separate chapters for Life and Fire Insurance, the principles being generally applicable to both, and the cases fixing those principles not only being wanting in one or the other, but being likely so to remain."[3]

§ 354. The deeds of settlement of most of the insurance companies in England contain a clause enabling the parties to refer matters in dispute to *arbitration*.[4] But in whatever form this clause is put, it will not take away the jurisdiction of the ordinary courts of law in the matter; and without it the parties may, if they mutually consent so to do, refer to

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[1] Ellis on Fire and Life Ins. 161.

[2] 2 Greenl. Ev. § 409.

[3] Preface to Beaum. on Fire and Life Ins. p. viii.

[4] Ellis on Fire and Life Ins. 89; Beaum. on Fire and Life Ins. 91.

arbitration.[1] If they do not so consent, the authority of the courts of law rides over every thing but the express words of an act of the legislature in abridgment of judicial cognizance.[2] Even a covenant between the parties to refer matters in dispute will not oust the courts of their jurisdiction, and cannot be pleaded in bar to an action.[3] If an award be actually made, it will be a bar to an action; or if the parties have submitted their differences to arbitration, and the reference be still pending, it would also appear to be a bar.[4]

§ 355. The legal remedy is ASSUMPSIT, provided the policy be *not under seal*, or DEBT or COVENANT, *if under seal*.[5] As in the action by the assured, it is founded on a particular and express undertaking made upon a consideration, upon which

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[1] Ibid. 2 Phill. on Ins. p. 599, sec. 1990, who refers to Robinson *v.* Georges Ins. Co. 17 Maine, R. 131. According to Phillips, (2 Phillips on Ins. p. 579, sec. 1941,) "Marine policies usually contain an agreement to settle all disputes by arbitration; or, in other words, that they will mutually constitute a committee that shall have jurisdiction of the policy; and he is not aware of any reported decree or judgment enforcing this stipulation."

[2] 2 Marsh. on Ins. 84; Kill *v.* Hollister, Wils. R. 120; 2 Story, Eq. Jurisp. § 1450, 1457; 1 Phill. on Ins. p. 37, sec. 58.

[3] Hammond on Fire Ins. 112, citing Thompson *v.* Charnock, 8 T. R. 139. It has been stated, in reference to the objection of setting up an agreement for the submission of a dispute to arbitration, that "associations might, upon the same principles, be formed, with agreements to have *all* questions of the civil rights and obligations of the members among themselves, settled independently of the public legal tribunals and the general laws, which would be thus far an *imperium in imperio*." 1 Phill. on Ins. p. 37, sec. 58, note 3. And see Kyd on Awards, 14; Street *v.* Rigby, 8 Ves. R. 815; Wellington *v.* M'Intosh, 2 Atk. R. 569; Tattersall *v.* Groote, 2 Bos. & Pull. R. 131; Goldstone *v.* Osborne, C. & Payne, R. 551; Gray *v.* Hartford Fire Ins. Co. 1 Blatch. (Cir. Ct.) R. 280.

[4] Ellis on Fire and Life Ins. 89, citing Kill *v.* Hollister, 1 Wils. R. 19; Beaum. on Fire and Life Ins. 91.

[5] Beaum. on Fire and Life Ins. Part III. p. 91, *et seq.*; Ellis on Fire and Life Ins. 89, *et seq.*; Hammond on Fire Ins. 112, *et seq.*; and see *ante*, Introd. § 12, *et seq.*; and *ante*, Treat. § 14.

the law would not, by necessary implication, raise the promise specified in the policy, the plaintiff must declare specially upon it.[1] The declaration sets forth, 1st. The policy; 2d. The defendant's subscription to the policy; 3d. The thing insured; 4th. The name or names of the parties interested; 5th. The cause of loss; 6th. The amount of loss. A particular form of declaration is allowed by statute to some of the insurance offices in England; which, however, is not in practice resorted to.[2]

§ 356. 1st. The policy must be described according to its true effect; any material variance will be fatal. It is material to state the regulations indorsed on the policy forming the conditions of the insurance, also all indorsements altering the policy after it was executed.[3] It is not material to state that the parties interested were described in the policy, for though their names must be inserted according to a statute, yet that not being necessary at common law, need not be stated in pleading. Subsequent counts may refer to the first, describ-

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1 Ellis, &c. *ub. sup.*

2 In Boynton *v.* Middlesex Mutual Fire Ins. Co. 4 Met. (Mass.) R. 212, the declaration alleged that the plaintiffs, on ———, owned and possessed certain buildings and goods in said ———, and that the defendants, on that day, in consideration, &c., caused the plaintiffs to be insured against loss by fire for the term of ——— years, and to the amount of $2,000 on said buildings, and $1,000 on said goods; that all said insured property, while owned and possessed by the plaintiffs, was destroyed by fire on ———; that the plaintiffs, on ——— next following, gave notice to the defendants that said property was thus destroyed, and demanded payment of the loss; whereby the defendants, agreeably to the terms and conditions of their said policy, became and were bound to make good and indemnify the plaintiffs, &c.; and in consideration thereof, then and there promised the plaintiffs to pay them, &c. For usual form of a count on a valued Fire Policy, see *n.* 1 to § 404 of 2 Greenl. Ev.

3 Strong *v.* Hervey, 3 Bing. 304; 11 East, 633; 4 Camp. 20; 1 Stark. 294; 7 Taunt. 385; 2 B. & C. 20.

ing the policy as of the same tenor or effect. It is necessary in the first count to state the policy in its exact terms, omitting clauses which do not apply to the case.[1] When the policy was made on the part of the assured through an agent, it may be stated as made by the principal.[2]

§ 357. 2d. A general averment that the defendant became an insurer on the premises mentioned in the policy is sufficient. The consideration must be stated to be the premiums mentioned in the policy renewed annually.[3]

§ 358. 3d. It is sufficient to state generally that the life or goods as mentioned in the policy are the goods or life on which the loss has happened.

§ 359. 4th. In the averment of interest, if the party be described as interested in a part, when his interest extends to the entirety, this is sufficient:[4] an averment that he is interested in the whole, when his interest only extends to a part, is sufficient.[5] But where two are jointly interested, and one is stated to be interested in one count and the other in another count, this variance is fatal.[6] The names of a firm need not be severally set forth, it is sufficiently described by a corporate name. The interest may have been at any time during the period of the risk; it is not necessary it should have existed when the policy was taken out.[7] An averment

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1 Robinson *v.* Tobin, 1 Stark. Rep. 336.

2 Bell *v.* Janson, 1 M. & Sel. R. 201, 204; 2 Salk. 519; Case *v.* Barber, 1 Ray. 450; 1 Saund. R. 167.

3 2 Marsh. 687. See 2 Marsh. 686.

4 But if he recover for one third, he cannot afterwards bring an action for the two thirds remaining of his interest.

5 Page *v.* Fry, 2 Bos. & Pul. R. 240; 3 Esp. R. 185; but this decision is questioned. See also Marsh *v.* Robinson, 4 Esp. R. 98.

6 Cohen *v.* Hannam, 5 Taunt. 101; Bill *v.* Ansley, 16 East, R. 411.

7 Wright and others *v.* Welbie, 1 Chit. R. 49. *Vide* Mellish *v.* Bell, 15 East, R. 4.

of interest at the time of the policy being effected is not material, and if alleged, need not be proved; it is sufficient to prove that the interest was vested during the period of the risk, and is now subsisting.[1] A payment of money into court precludes the defendant from objecting that the averment of interest was not substantiated.[2]

§ 360. 5th. The cause of loss should be correctly stated, detailing the facts; and, 6th, a partial loss may be given in evidence under an allegation of a total loss. "This is an action upon the case, which is a liberal action, and the plaintiff may recover less than the ground of his declaration supports, though not more."[3]

§ 361. When an adjustment has taken place, it need not be declared upon specially, but may be given in evidence as an admission upon the usual declaration, or upon an account stated.[4]

§ 362. The *venue* may be laid in any county, and cannot be changed if the cause of action arise out of the realm. But the *venue* may be changed before plea in abatement or bar, upon the usual rule (except in case the policy be under seal) upon affidavit that the cause of action arose in that other county. If material evidence arise in two counties, the *venue* may be laid in either; and if it be laid in a third county, the courts will not change it. On special grounds the court will change the *venue* in all cases.[5]

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[1] Rhind *v.* Wilkinson, 2 Taunt. R. 237.

[2] 16 East, R. 146.

[3] Gardiner *v.* Crossdale, 2 Burr. R. 904; Bl. R. 198.

[4] Marsh. Ins. 644. See *ante*, Chap. XI.

[5] Sid. R. 625. In Boynton *v.* Middlesex Fire Insurance Company, in Massachusetts, (4 Met. Mass. R. 212,) an action of assumpsit was brought upon a fire insurance policy in the name of two plaintiffs, one of whom was described to be of Cambridge, in the county of Middlesex, and the other of

§ 363. In actions of assumpsit the *plea* of the general issue enables the defendant to avail himself of most matters of defence. But disabilities, the Statute of Limitations, a tender, bankruptcy of defendant, and sometimes, where material, the bankruptcy of the plaintiff, also "set off," must be severally pleaded specially. Also recovery under another policy will be a bar to an action respecting the insurance on the same interest.[1]

§ 364. Production of the policy, with adjustment, is not proof of payment.[2] When the policy is by deed under seal, and the action consequently debt or covenant, there is, strictly speaking, no general issue. But a general plea is allowed by statute to some of the English insurance offices.

Boston, in the county of Suffolk. SHAW, C. J., stated the general rule of law to be, in respect to fixing the county in which actions are to be brought, and requiring them to be brought in the county where one of the parties lives, it is provided, that if either of the parties consists of two or more persons, living in different counties, the action may be brought, so far as it depends upon their place of residence, in the county where either of such persons lives; and he cited Rev. Sts. of Mass. c. 90, § 15. So far, he said, as the present plaintiffs were concerned, therefore, the action was well brought in the county of Suffolk. The action was on a policy of insurance brought in Suffolk county against the Middlesex Mutual Fire Insurance Company, the declaration in which merely set forth the policy, the loss, and notice given to the directors within thirty days, and the neglect of the Company to pay, according to the terms and conditions of the policy. The Company pleaded, in abatement, that the action should have been brought in the county of Middlesex; and the plea was held to be bad.

The provision in a charter of an insurance company, that it shall, in a certain case, be liable to an action only in the State where it is chartered, does not exclude the jurisdiction which the courts of another State would otherwise have. Williams *v.* Fire Ins. Co. 16 Shep. (Me.) R. 465. The jurisdiction accrued in Maine against a garnishee.

In Massachusetts, a suit on a policy by a resident of another State was held to be maintainable against a corporation in any county. Allen *v.* Pacific Ins. Co. 21 Pick. (Mass.) R. 257.

[1] See Selwin, Nisi Pr. "Assumpsit."

[2] Adams *v.* Saunders, 1 Mo. & Mal. R. 373.

§ 365. *Payment of money into Court.*[1] Money may be paid into court upon the whole declaration, or upon one or more of the counts contained in it. When the assured are only entitled to recover the premiums, money should be paid in on that count. A payment of money into court *generally* is an admission of the policy stated in the special counts, unless the plaintiff has by his conduct induced the defendant to suppose that the question to be tried was a question of fraud.[2] And a payment into court is not an admission beyond the extent of the sum paid in, and the admission will be strictly limited to the very objects of the policy, and the very averments in conformity with those objects contained in the declaration. Where the demand is illegal on the face of it, the payment into court is no admission. So the payment into court does not prevent a defence of illegality, or the Statute of Limitations.[3]

§ 366. In a declaration upon a policy *under seal,* its contents

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[1] This in England is under stat. 19 Geo. 2, c 37, § 7. See Solomon *v.* Berwicke, 2 Taunt. R. 317.

[2] Muller *v.* Hartshorne, 3 Bos. & Pul. R. 556.

[3] Cox *v.* Parry, 1 T. R. 464; 1 Bos. & Pul. 264; 2 Marsh. Ins. 703; Long *v.* Greville, 3 B. & Cress. R. 10. For the above summary of authorities, the author has been indebted to Beaum. on Fire and Life Insurance. In regard to the subject of Limitations, it has been held by a Circuit Court of the United States, that where a policy of insurance provided, that no action should be sustained against the insurer founded thereon, unless brought within twelve months after the cause of action should accrue, and that the lapse of time, in case of such suit, should be deemed conclusive evidence against the validity of the claim set up; a plea setting up such provision, and the lapse of time specified, in bar of an action on the policy, was a conclusive answer to the suit; that the provision was not against law, nor repugnant, nor impossible; that the right to indemnity in case of loss, and the liability of the insurer therefor do not, under such a provision, become absolute, unless the remedy is sought within the period limited. The stipulation goes to the right as well as to the remedy. Gray *v.* City of Hartford Fire Ins. Co. 1 Blatch. (Cir. Ct.) R. 280. — Nelson, J.

are much the same as that in assumpsit, except in matter of form essential to the declaration upon a policy under seal, in a declaration upon which the policy should be recited *verbatim;* together with all the proposals and conditions to which it refers, constituting a condition precedent; and any material variance or omission will be fatal.[1] The declaration should also state that the plaintiff, "at the time of making the policy, and from thence, until the loss or damage, was *interested*"[2] in the goods or premises mentioned in the policy to the amount and value of the sum claimed. It should moreover state (in a fire policy) that the fire did not happen by any invasion, &c., or by any of the excepted cases,[3] and that the plaintiff thereby sustained a loss and damage to the amount of the sum claimed. It should also state his compliance with the conditions previously recited, and his payment, and the acceptance by the defendants, of the premium, and that the stock and funds of the company are sufficient to pay to the plaintiff the amount of the damages sustained by him. He should then aver the *breach*, that he has not in any manner been paid or made good his damage, but that the same is unpaid; that the defendants have *broken the covenant* made with the plaintiff; and the damages are generally laid at a sum somewhat larger than the sum insured for.[4]

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[1] 3 Chitty on Plead. 288, 325; Ellis on Fire and Life Ins. 90. *Covenant* is the most frequent form on a sealed policy. 2 Phill. on Ins. p. 586, sec. 1956; 2 Marsh. on Ins. 686. A general form of declaration in *debt* is given against the two incorporated companies in England — the Royal Exchange and the London Assurance, but it is not usually adopted in practice. 3 Chitty on Plead. 325, and Hammond on Fire Ins. 113.

[2] As to the importance of an interest in the assured in Fire policies, see *ante*, Chap. IV., in Life Policies, *ante*, Chap. XIV.

[3] See *ante*, § 109, 110.

[4] Ellis on Fire and Life Ins. 90, 91, and p. 2, and see *ante*, § 30. See also *ante*, Chap. XI., as to Adjustment of Loss. Some cautious pleaders, says Ellis, p. 10, in framing declarations on behalf of the assured to recover upon a loss, aver that the share of the capital in the company belonging to

§ 367. The *pleas* to a declaration upon a policy *under seal* vary according to circumstances. The most usual, however, are an absolute denial that the articles mentioned in the declaration were burnt or consumed, and this plea puts the plaintiff upon the proof of the quantity, quality, amount, and value of his loss. Where buildings, ricks, or the like, exposed to public view, are burnt, it is not usual to include them in such a plea; as the declaration usually states that the plaintiff delivered in as particular an account of the loss and damage as the nature of the case admitted of (according to one of the conditions common to most policies.) The defendants also, by another plea, usually deny this fact, and this also puts in issue the quantity, quality, amount, and value of the articles alleged to be consumed. It is usual also, in another plea, to allege *fraud* in the claim made, where the case warrants it, which it commonly does whenever the insurers are driven to resist an action, and they then refer to the condition with reference to *fraud and false swearing*, common to all fire policies, and recited in the declaration, whereby the plaintiff forfeits all benefit under his policy, except such as the company may think fit to allow. As the conditions of most offices require the account of the loss and damage sent into the office to be verified by affidavit,[1] it is very usual, by another plea, to allege *false* swearing, in the claim made: such a plea contains the language of the affidavit, alleges that in such

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the directors, amounts to some large sum of money more than sufficient to cover the sum insured for, with the object of affecting the subscribing directors personally, in case, by means of any defect in the internal machinery of the company, or any other cause, the joint-stock funds of the company should not be available to the purpose. In a policy *under seal*, the contract must be set forth with *precision*, and any material variance or omission will be equally fatal, so that it is usual to add a count for money had and received, and an account stated, to enable the plaintiff to avail himself of any balance which the defendants may have admitted to be due. 2 Marsh. on Ins. 686; Ellis, 91; 3 Chitty on Plead. 99.

[1] See *ante*, Chap. X.

affidavit there is false swearing, refers to the before-mentioned condition, and states in general terms the points on which it is false.

§ 368. For the usual form in the action of assumpsit, the *general issue* is the only plea usually necessary, and commonly embraces all the matters of defence which the insurers may desire to bring forward. But the same rule does not hold when the policy is under seal, and the action is consequently in debt or covenant. In the latter there is, generally speaking, no general issue; and the plea of *non est factum*, though it puts in issue the validity of the instrument, under seal, as such, does not, in general, enable the party sued to avail of the non-performance of a warranty or condition precedent, or of a matter in excuse or discharge of performance.[1]

§ 369. An action of TROVER will lie when a policy of insurance has been executed according to the agreement of the parties, and is withheld by the underwriter.[2] Where a mutual insurance company, authorized by its charter to receive notes for premiums in advance, for the better security of its dealers, and to negotiate such notes for the payment of claims, receives a note for those objects, which is payable to the *maker's order, and not indorsed*, it is an available security in the hands of the company; and a court of equity will compel its indorsement by the maker; and if it be wrongfully withdrawn from the company, its amount may be recovered in trover by the company.[3]

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[1] Ellis on Fire and Life Ins. 91, 92; Hamm. on Fire Ins. 115. And see 2 Hall, (N. Y.) R. 490. As to the plea of the general issue in Assumpsit, *ante*, § 355; 2 Greenl. Ev. § 404; 2 Peters, (U. S.) R. 25; 10 Ib. 507; 1 Stark. R. 311, cited in Hamm. 115. See *ante*, § 142.

[2] *Ante*, § 31; 2 Phill. on Ins. p. 599, sec. 1992; Tayloe *v.* Merchants' Fire Ins. Co. 9 How. (U. S.) R. 390.

[3] Brouwer *v.* Hill, 1 Sand. (N. Y.) Sup. Ct. R. 620, and Same *v.* Crosby, Ibid.

§ 370. Evidence. Although the first step on the part of the assured, in a suit upon a policy, is to prove the contract by producing the policy, and its due execution; it is not often that insurance offices require it. The production of the policy, if there be no variance, is conclusive evidence of the contract;[1] and, as it has been made to appear,[2] parol proof is not admissible to vary the terms or legal intent of the policy; the only and necessary exceptions to this general rule being *mistake* and *fraud*, or an *explanation of the language* of the policy in reference to the usual practice of trade.[3]

§ 371. The policy, we have seen,[4] sometimes directly refers to other documents, and may do so in such a manner as to make them in effect a part of the instrument itself. This is usually the case in reference to the terms and conditions indorsed upon them. The manner of making the reference, and the object of it, determine how far the indorsement or separate document referred to is thus made a part of the contract, or is evidence in the construction of it.[5]

§ 372. The assured either proves that the company, by its proper officers, subscribed the policy, or that some agent in their name had often subscribed policies, and that said agent was *held out to the world as duly authorized for such purpose;* such proof having been held sufficient, without proof of written authority.[6] Lord Ellenborough held this to be sufficient *primâ facie* evidence, though the witness, who was the agent, stated that he had a written power, but did not produce it.[7]

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1 Ellis, Fire and Life Ins. 93.

2 *Ante*, § 20.

3 *Ante*, § 20–28.

4 *Ante*, § 14.

5 And see 2 Phill. on Ins. p. 657, sec. 2117.

6 2 Phill. on Ins. p. 656, sec. 2114.

7 Haughton *v.* Ewbank, 4 Camp. R. 88, cited in 2 Phill. *ub. sup.*; who also cites Johnson *v.* Ward, 6 Esp. R. 47; Brockerbank *v.* Sugrue, 6 C. & Payne, R. 21.

§ 373. As it has already appeared,[1] an indiscriminate resort to the testimony of *usages* and *customs* of trade, to control the construction and the results of written contracts, is liable to dangerous abuses; and such testimony is to be admitted in the construction of policies of insurance with great discrimination and caution.[2]

§ 374. The assured must also prove an *interest*, and he can only recover the amount or value of his interest; though a slight interest is sufficient for the purpose of enabling the assured to recover.[3] Insurance by A and B on a building, without any specification of the interest, is sustained by proof of the interest of one as mortgagor, and the other as mortgagee.[4]

§ 375. The assured, on the trial, must aver a compliance with every material averment in the declaration as express warranties, or conditions precedent; the delivering in an account of the loss and damage to the office, with evidence in support of it, according to the rules laid down by the respective offices; the construction of the buildings, if the question be raised; and the nature of the property insured.[5] The accident of *fire*, which was the cause of the loss, must also be set forth in the declaration, and proved, if not admitted; the loss or damage must be shown, which must appear to have hap-

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[1] See *ante*, § 25, 26.

[2] See in particular, Hone *v.* Mutual Ins. Co. 1 Sand. (N. Y.) Sup. Ct. R. 137.

[3] Ellis on Fire and Life Ins. 93. That assured must have an interest in a Fire Policy, see *ante*, Chap. IV., and in Life Policy, *ante*, Chap. XIV. "It has been said," Mr. Phillips states, (Chap. XIII.) "that proof of interest at the beginning of the risk is sufficient, notwithstanding an assignment before the loss." But this, he adds, is against the current of jurisprudence." See 2 Greenl. Ev. § 405.

[4] Per Tindal, C. J., in Pim *v.* Reid, 6 M. & Grang. R. 1; and see *ante*, § 59.

[5] Ellis on Fire and Life Ins. 94; 2 Phill. on Ins. p. 666, sec. 2122; 2 Greenl. Ev. § 406; and see *ante*, Chap. VI. VII. VIII. XV.

pened during the continuance of the risk. The word "fire" is to be construed in its ordinary signification, and the proof of loss must show an actual *ignition;* for damage done by heat alone, or by *lightning*, without actual burning, is not covered by the policy.[1] Where the defence is, that the property was *wilfully* burnt by *the assured himself*, whether the crime must be as fully and satisfactorily proved to the jury as would warrant them in finding him guilty on an indictment for *arson*, the authorities appear to differ.[2] The fact that the assured in his affidavit estimated the value of the goods consumed at $2,800, and the jury returned a verdict for $1,853 only, is not such evidence of fraud and false swearing as would justify the court in granting a new trial.[3]

§ 376. PARTIES. The party suing upon a policy must of course have what the law considers an *insurable interest*,[4] so that if a party, beneficially interested in the insurance, relinquishes his interest in the subject insured before a loss happens, there remains nothing to which the contract can apply.[5] This may happen in case of a sale of the subject.[6] Where the question was whether a bankrupt had an interest in the goods insured at the time of the loss, it was held that the effect to be given to the stoppage of goods *in transitu* was to rescind the contract, and to revest the property in the original owners, and hence that the bankrupt having no property in the goods insured, after the stoppage, his assignee could not support an action on the policy.[7]

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[1] Ellis, 94; but see *ante*, § 113 – 122; 2 Greenl. Ev. § 405.

[2] See *ante*, § 133, and 2 Greenl. Ev. § 408.

[3] Moore *v.* Protection Ins. Co. 16 Shep. (Me.) R. 97; Levy *v.* Baillie, 7 Bing. R. 349.

[4] As to what is an insurable interest in a Fire Policy, see *ante*, Chap. IV., and in a Life Policy, *ante*, Chap. XIV.

[5] 2 Phill. on Ins. p. 597.

[6] Ibid., *ante*, Chap. IX.

[7] Clay *v.* Harrison, 10 B. & Cress. R. 63, Lloyd & Welsb. R. 104.

§ 377. It is obvious, then, that if two tenants in common insure against a loss by fire, and after the insurance, but before the loss, one of them conveys the whole of his interest to the other, a joint action by them upon the policy cannot be maintained;[1] yet a conditional transfer of the property insured to secure a debt or liability is not attended with the like consequence;[2] for one who has mortgaged, even to the full value of his property, has still an insurable interest.[3] If the ownership remains the same, and a loss happen, an action on the policy by one of the co-tenants to recover his share of the loss cannot be maintained; for actions upon policies of insurance (though such instruments are to be liberally construed) are no exception to the general rule in respect to joinder of parties.[4]

§ 378. If the act of incorporation provides that the assignee of the assured may sue in his own name, such assignee must aver that he has become the purchaser or assignee of the subject insured; a general averment of the plaintiff's interest not being sufficient.[5]

§ 379. In Jefferson Insurance Company *v.* Cotheal,[6] it appeared that a fire insurance policy insured two persons by name; and that the words of *whom it may concern* were added, and a clause was inserted in the policy, that the loss, if any occurred, should be paid to the individuals named; and it was held that whoever the person might be who was in-

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[1] Murdock *v.* Chenango County Ins. Co. 2 Comst. (N. Y.) R. 210.

[2] Per Parker, C. J., in Gordon *v.* Massachusetts Fire and Marine Ins. Co. 2 Pick. (Mass.) R. 249.

[3] *Ante*, § 58, 59.

[4] Blanchard *v.* Dyer, 8 Shep. (Me.) R. 111. The averment of a joint interest is not supported by proof of sole interest. 3 Paine, (Cir. Ct.) R. 615.

[5] 5 Wend. (N. Y.) R. 200.

[6] Jefferson Ins. Co. *v.* Cotheal, 7 Wend. (N. Y.) R. 72.

terested in the policy, might bring an action in his name.[1] But although it is very clear that one person may insure in his name the property of another, and that it will enure to the party's interest intended to be protected, upon his subsequent adoption of it, even after a loss has occurred; yet no one can claim the benefit of an insurance made by another, for the benefit or account of whom it may concern, without showing that it was the intention of the person obtaining the insurance to embrace his interest in the property insured, at the time of the insurance.[2]

§ 380. In case of a *double insurance*, by two insurers, the assured may elect to consider each insurer as liable to bear a proportionate share of the loss, and recover accordingly; or to require either of them to pay the whole; in which latter case the one who pays the whole or a disproportionate part of the loss, would have a remedy against the other for a contribution.[3] Where in such case the assured commenced an action of assumpsit on both policies at the same time, and one of the insurers paid into court one half of the actual loss, (first making certain deductions by way of set-off,) and the assured took the money out of court, it was held that this was *primâ facie* evidence that he had made his election to consider each insurer responsible for one half of the sum actually at risk.[4]

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[1] And see *ante*, § 79 – 83; Conover *v.* Mutual Ins. Co. 3 Denio, (N. Y.) R. 254.

[2] See *ante*, § 79 – 83; De Bolle *v.* Pennsylvania Ins. Co., and cases cited in connection therewith. Fleming *v.* Marine Ins. Co. 4 Whart. (Penn.) R. 59.

[3] See *ante*, § 88, and Wiggin *v.* Suffolk Ins. Co. 18 Pick. (Mass.) R. 145.

[4] Wiggin, &c., *ub. sup.*

CHAPTER XIX.

OF THE PROCEEDINGS IN EQUITY ON POLICIES OF FIRE AND LIFE INSURANCE, AND ATTACHMENT OF EQUITIES.

§ 381. Although the jurisdiction upon questions arising out of the contract of insurance belongs exclusively to the common-law courts,[1] courts of equity will in certain cases of insurance, as in all other contracts, interpose their authority, when there is no other adequate remedy.[2] Thus, as we have had occasion to show, it is within the province of a court of equity to compel a specific performance of an agreement to make or renew a policy.[3] It was objected in Tayloe *v.* Merchants' Fire Insurance Company, in the Supreme Court of the United States,[4] that in case of an executory contract for an insurance, the plaintiff had an adequate remedy at law, and was not, therefore, under the necessity of resorting to a court of equity; which, said the court, might very well be admitted. "But," say they, "it by no means follows from this that a court of chancery will not entertain jurisdiction. Had the suit been instituted before the loss occurred, the appropriate, if not the only remedy, would have been in that court to enforce a specific performance, and compel the company to issue the policy. And this remedy is as appropriate after as before the loss, if not as essential, in order to

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[1] Ellis, Fire and Life Ins. 88.

[2] 2 Phill. on Ins. p. 575, sec. 1936.

[3] See *ante*, § 31, *et seq.*; Brouwer *v.* Hill, 1 Sand. (N. Y.) Sup. Ct. R. 629.

[4] Tayloe *v.* Merchants' Fire Ins. Co. 4 How. (U. S.) R. 390.

facilitate the proceedings at law. No doubt a count could have been framed upon the agreement to insure, so as to have maintained the action at law. But the proceedings would have been *more complicated* and *embarrassing* than upon the policy. The party, therefore, has a right to resort to a court of equity to compel the delivery of the policy, either before or after the happening of the loss; and being properly in that court after a loss has happened, it is according to the established course of proceeding, in order to avoid expense and delay to the parties, to proceed and give such a final relief as the circumstances of the case demand."

§ 382. The case of Carpenter *v.* Providence and Washington Insurance Company, in the same court,[1] was of different character from the one above mentioned. A bill was filed by the assured in this case, alleging that *notice of other insurance* on the same property was given to the insurance company, and praying that the company might be compelled to indorse the notice upon the policy, or otherwise acknowledge the same in writing; and it was the opinion of the court, that when the answer of the company, sworn to by the president, denied the reception of the notice, to the best of his knowledge and belief, the question became one of fact and of law; of fact, whether the evidence offered by the complainant was sufficient to sustain the allegation; and of law, whether, if so, a court could compel the company to acknowledge it. The assured must have evidence of giving notice.

§ 383. The jurisdiction of a court of equity to *reform a policy* in case of *mistake* is undoubted, provided the evidence for this purpose be very clear. If the instrument be ambiguously expressed, so that it is difficult to give it a construction, the agreement in referenee to it may be resorted to in order to explain the ambiguity. But if the policy be so expressed, that

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[1] Carpenter *v.* Providence Washington Ins. Co. 4 How. (U. S.) R. 185.

a reasonable construction can be given to it, and when so given it does not plainly appear to be at variance with the agreement of the parties, the latter is not to be regarded in the construction of the former.[1] The case of Collett *v.* Morrison,[2] fully establishes, that if there be an agreement for a policy in a particular form, and the policy be drawn up by the office in a different form, varying the right of the party assured, a court of equity will interfere, and deal with the case upon the footing of the agreement, and not of the policy.[3]

§ 384. A court of equity is the proper tribunal to which to apply to compel the assured to surrender a policy fraudulently obtained, to be cancelled;[4] and in life insurance the company have a better equity, if they bring their bill in the lifetime of the assured.[5] A company called the "Anchor Assurance Company," in 1847, granted an insurance for 3,000*l.* on the life of C. D., and afterwards, as a cross insurance, insured the life of C. D. for 1,000*l.* in the India and London Life Assurance Company. In 1848, the 3,000*l.* policy was bought by the A. Company from the grantee, in consideration of an annuity. In 1850, C. D. died, and the A. Company brought an action to recover the 1,000*l.* The I. & L. Company filed a bill to restrain the action, and to have the 1,000*l.* policy delivered up, it being alleged that in consequence of the purchase of the

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[1] See this subject considered more at large, *ante*, § 22, *et seq.*; 2 Phill. on Ins. p. 576, sec. 1937; Franklin Fire Ins. Co. *v.* Hewitt, 3 B. Mon. (Ken.) R. 231.

[2] Collett *v.* Morrison, 9 Hare, Ch. R. 162.

[3] This is an important case, to show the circumstances in which life, as well as other, insurance companies preparing and issuing policies not in conformity with the agreement upon which the insurance was accepted, may be liable in equity on the ground of fraud.

[4] 2 Phill. on Ins. p. 577, sec. 1938; Adams Doct. of Equity, [175]; 1 Story, Eq. Jurisp. § 216; Hoyt *v.* Gilman, 8 Mass. R. 336; and see as to Fraud and Concealment, *ante*, Chap. VII., VIII., XV.

[5] Fenn *v.* Craig, 3 You. & Coll. R. 216.

3,000*l.* policy, the 1,000*l.* policy became invalid; and a demurrer to this bill was held not to be sustainable. The decision was upon the ground, that if the action, which was alleged to have been brought for the whole amount of the property named in the policy, was maintainable, the facts stated show that there was an *equity* against it; and the Vice-Chancellor said, — "I think, under the particular circumstances of this case, this bill is maintainable for the purpose of having the policy delivered up. In either way, therefore, I think an equity is stated, considering what the prayer of the bill is, namely, that the policy may be delivered up."[1]

§ 385. A court of equity has jurisdiction in cases in which policies or their proceeds may be affected by a *trust;*[2] and to compel a trustee to permit his name to be used in a suit at law, for the benefit of the parties interested.[3]

§ 386. The established rule of law, that the assured in a life policy must have an interest, does not prohibit such policy from being granted to a person in trust for another, where the names of both persons appear upon the face of the instrument; nor does the effecting of such an insurance in any way contravene the policy of the law.[4]

§ 387. By an order of the Court of Chancery, the receiver of certain real estates was directed to pay certain fire insurances on them; and by a subsequent decree it was declared that H. was tenant in tail in possession of real estates, and the receiver was directed to pay the balances to the account of

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[1] India and London Life Assurance Co. *v.* Dalby, 15 Jur. 982, and S. C. 7 Eng. Law & Eq. R. 250; and see Barker *v.* Richardson, 1 You. & Jer. R. 362.

[2] Ellis on Fire and Life Ins. 88.

[3] 2 Phill. on Ins. p. 578, sec. 1939; and see Mackenzie *v.* Mackenzie, 8 Eng. Law & Eq. R. 67, and S. C. 15 Jur. 1091.

[4] Collett *v.* Morrison, 9 Hare, Ch. R. 171.

H.; and, a fire having taken place, it was held that H. was entitled to the insurance money.[1]

§ 388. The *cestui que trust* is a party in interest to a policy effected by the trustee.[2] In case of a fire policy effected by an executor, on buildings belonging to an estate that was charged with an annuity, the buildings being a principal part of the estate, the Court of Chancery, on a bill filed by the annuitant, ordered that the proceeds of the policy should be invested as security for the annuity.[3]

§ 389. A fire policy provided that any loss should be payable to the assured, his executors, administrators, or assigns, and that, when any assignment of the policy should be made, it should be entered in the office-books within forty-two days, or else the assignee should have no benefit. The assured died during the risk, and the premises descended to the heir, and a loss took place, (no assignment of the policy having been made to the heir.) It was held, that the loss was payable to the executors, and not to the heir, the estate having gone to the heir before the loss.[4]

§ 390. If a policy of insurance empowers the underwriters to replace goods damaged or destroyed by a peril insured against, within a specified time after the loss, upon a loss under the policy, a court of equity has no jurisdiction to restrain the assured from disposing of the property saved, within the time allowed for their replacement, for the purpose of enabling the underwriters to examine the goods.[5]

§ 391. Equity will interpose to order a *set-off* of the agent's

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[1] Seymour *v.* Vernon, 16 Jur. 189; S. C. 10 Eng. Law & Eq. R. 40.

[2] 2 Phill. on Ins. p. 593, sec. 1976.

[3] Parry *v.* Ashley, 3 Sim. Ch. R. 97.

[4] Mildmay *v.* Folgham, 3 Ves. R. 472, and cited in 2 Phill. *ub. sup.*

[5] New York Fire Ins. Co. *v.* Delavan, 8 Paige, (N. Y.) Ch. R. 419.

premium notes, against a judgment for loss which could not be set off at law.[1] The rule in equity is, that if cross demands are of legal cognizance, the right of set-off is also legal; and unless one of the demands involves an equitable element, their existence creates no equity for resorting to the Chancery.[2] If one or both be matter of equitable cognizance, (as, for example, there be a question of trust or fraud,) the set-off may be enforced by a court of equity.[3] The assignee of a policy takes it subject to every set-off that existed between the original parties, at the time of the assignment.[4]

§ 392. *To order distribution of the effects of an insolvent insurance company* is laid down as one of the instances of the interposition of a court of equity.[5] When a fire takes place which requires the whole funds of the company, the losers have an immediate vested right in the funds of the company, to the extent of their loss.[6]

§ 393. In the State of New York, an act was passed on the 18th of January, 1836, for the more convenient adjustment of the affairs of certain Fire Insurance Companies in the city of New York, rendered insolvent by the great fire in the city, just preceding it. It was the particular intention of the legislature, not only in the act referred to, but also in the provisions of an article in the revised statutes, (2 *Rev. Sts.* 464,) to provide a summary mode of closing up the concerns of insolvent

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[1] 2 Phill. on Ins. p. 577, sec. 1039, citing Leeds *v.* Marine Ins. Co. 6 Wheat. (U. S.) R. 565.

[2] Adams, Doct. of Equity [223]; Holbrook *v.* American Fire Ins. Co. 6 Paige, (N. Y.) Ch. R. 220.

[3] Ibid.

[4] Gourdon *v.* North American Ins. Co. 3 Yeates, (Penn.) R. 327; 1 Binn. (Penn.) R. 430, in note; Rousset *v.* North American Ins. Co. Binn. R. 429; and see De Peyster *v.* American Ins. Co. 6 Paige, (N. Y.) Ch. R. 486.

[5] 2 Phill. on Ins. p. 578, sec. 1039.

[6] Colton *v.* Alleghany County Mutual Ins. Co. 1 Barr, (Penn.) R. 322; Rhinehart *v.* Same, Ibid. 350.

corporations, without the expense and delay of formal suits to settle and ascertain the claims of creditors. The Court of Chancery, therefore, considered it improper to permit any such suits to be commenced by the creditors, to ascertain their rights to a distributive share of the fund; but the creditors should be compelled to submit them to a reference under the legislative provisions; and if any creditor refused to present his claim for adjustment, the distribution of the funds should be made without reference to such claims, except in those cases where the receivers are able to ascertain and liquidate the amount of such claim by the books and papers of the company in their possession. But as it would be impossible to give personal notice to all the creditors to present their claims for adjustment, and a notice in the papers might not reach those creditors who resided out of the city within the short time required to a speedy adjustment of the claims against the corporation, so that the sufferers by the fire should not be kept out of their share of the fund for any considerable length of time, the receivers should endeavor, as far as possible, to ascertain the amount justly due to each creditor, whether such creditor actually presented his claim therefor, or otherwise. And at a meeting of the creditors to be called pursuant to the direction of the legislature, if any question might arise requiring the direction and decision of the Court of Chancery, before a distribution of the fund is made, they could be submitted in a summary manner, or upon the petition of the party making a claim to preference in payment, or other claim against the fund: and upon such notice as the court should think proper to direct, if the service of personal notice be impracticable, or would be inconvenient or expensive. "But," (to use the exact words of Chancellor WALWORTH,) "as the order of the court upon such an application must be decisive of the rights of the parties, unless appealed from, the court should not proceed upon a mere *ex parte* hearing without directing some notice to be given, either in the public papers, or otherwise, so that the several creditors interested in the fund, whose rights might be affected by the decision, may have an oppor-

tunity to be heard. It would, therefore, be improper for me, upon this *ex parte* petition, to undertake to give any direction to the receivers in relation to the various questions which appear to have arisen, even if I had jurisdiction of the case; although some of those questions appear to be so plain as not to admit of a reasonable doubt. I am satisfied, however, upon examination, that I have no jurisdiction of the case except upon appeals which may be made from the decisions of the Vice-Chancellor of the first circuit therein."[1]

§ 394. Under the legislation of the State of New York, referred to in the preceding section, arose the following case: A person executed a mortgage to an insurance company to secure a loan. The same company had insured certain property of the mortgagor, and the policies had been assigned by him, with the consent of the company, as collateral security for loans. The premises insured were destroyed by fire, and the company having become insolvent, receivers were appointed, and the assured delivered up the policies, and received the negotiable certificates of the receivers, under the statute, showing the amount of the loss, and the right of the holder to payment ratably with the other creditors, and such certificates were immediately assigned to the previous holders of the policies, and remained in their possession, as security for their

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[1] Globe Ins. Co. (in the matter of the Receivers of,) 6 Paige, (N. Y.) Ch. R. 102; and see Lowene *v.* American Fire Ins. Co. 6 Paige, (N. Y.) Ch. R. 482. A person who had loaned money to an insurance company, to pay a loss which occurred prior to the disaster which rendered the company insolvent, was not allowed a priority in payment out of the property in the hands of the receivers, under the statute of New York above mentioned, over those claiming for a loss by such disaster. De Peyster *v.* American Ins. Co. 6 Paige, (N. Y.) Ch. R. 486. A surplus fund arising out of the *profits* of a New York insurance company, which has not been distributed among the stockholders, will, on the insolvency of the company, be applied to pay the debts of the company in preference to being distributed among the stockholders. Scott *v.* Eagle Fire Ins. Co. 7 Paige, (N. Y.) Ch. R. 198.

claims, until after the commencement of a suit by the receivers of the company, to foreclose their mortgage. It was held, that the ratable dividends on the certificates, only, could be set off by the mortgagor, against the amount due on the mortgage.[1]

§ 395. *Interpleader.* Where various parties assert conflicting interests in a policy, and the defendants, in a suit against them, bring the adverse claimants before the court by a bill of interpleader, neither of the parties can call upon the other for an account of his claims, without first establishing his own interest in the fund, that is, in the amount of loss that has accrued under the policy.[2] A bill of interpleader has been held to lie in favor of an insurance company against the landlord of the premises which have been burnt down after having been insured by him, (and who brought an action against the office upon the policy,) and against the tenant who filed a bill against the landlord and the office for a specific performance of an agreement for a lease, and claiming a right to have the money laid out in rebuilding the premises.[3] If a tenant for life and the remander-man join in effecting insurance, they will be proportionably interested, and the application of the proceeds of the policy will give to each a just proportion of the benefit of the insurance. But if the tenant for life insures a building without any agreement with the remainder-man respecting the insurance, the latter has no interest in the policy, and the assured may apply the proceeds in putting up a new building in place of the one burnt down, or not, as he may choose.[4]

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[1] Swords *v.* Blake, 3 Edw. (N. Y.) Ch. R. 112.

[2] 2 Phill on Ins. p. 593, 594, sec. 1978, citing Spring *v.* S. Car. Ins. Co. 8 Wheat. (U. S.) R. 268; Hennesy, *in re*, 2 Drury & Warren, Ch. R. 555; Glynn *v.* Lock, 3 Ib. 11.

[3] Paris *v.* Gilham, Jones *v.* Paris, Coop. Chan. Cas. 56.

[4] 1 Phill. on Ins. p. 198, sec. 349; Brough *v.* Higgins, 2 Gratt. (Va.) R. 408; Haxall *v.* Shippen, 1 Leigh, (Va.) R. 437; and see Fire and Marine Ins. Co. *v.* Morrison, 11 Leigh, (Va.) R. 355.

§ 396. Next, as to the *attachment of equities* to policies of insurance on life, in favor of third persons. 1. Policies of insurance, as well on life as on fire, are separate and distinct contracts between the assured, or party effecting the insurance, and the insurers, made for the sole benefit of the assured, or party effecting the insurance, whatever may be the nature of the interest covered by it; and unless there be some contract or agreement, or trust, express or implied, between the party effecting the insurance, and third persons, the latter can have no more right in a court of equity than in a court of law to affect the proceeds of the policy in the hands of the insured.[1]

§ 397. Susannah Baker,[2] in consideration of 1,150*l.*, assigned certain premises, called Pond Farm, to Law, for ninety-nine years, if she should so long live, subject to redemption, and Law subsequently assigned to Collier. S. Baker, with other necessary parties, afterwards conveyed the said premises, with others, in fee, to certain persons as trustees to sell. The trustees agreed to sell the equity of redemption of Pond Farm to Collier, to whom it had been assigned as aforesaid during the life of S. Baker, for 4,800*l.* Law, to whom the life-interest of S. Baker in the premises had been originally assigned, had insured S. Baker's life, to secure himself from loss in respect of the money advanced, and subsequently assigned the policy to Collier, who kept it on foot, and also effected another policy on S. Baker's life for 700*l.*, and on the death of S. Baker received the sums due on both policies. Collier agreed to pay the 4,800*l.* on the 29th of September then next, (1819,) provided, that in case S. Baker should be living at the time of the payment of the purchase-money, Collier should be allowed 1,150*l.* thereout (the value of the life-interest previously paid.) In case any unforeseen occurrence

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[1] Beaumont, 76.

[2] Watson *v.* Brutton, MS. Feb. 24, 1830, cited in Ellis on Fire and Life Ins. 155.

should prevent the conveyance of the said premises from being executed by the 29th of September, Collier was to pay interest on the 4,800*l.* subject to such deduction as aforesaid, from the 29th of September until the completion of the purchase. If Collier made default, the conveyance being ready on the 29th of September, a penalty, as liquidated damages, was to be paid, and the contract was to be void. Delay took place in the conveyance until after the 29th, but without the default of Collier: S. Baker lived over the 29th of September, and died in 1822. It was submitted by the plaintiffs, who were the assignees under the insolvency of the eldest son and heir at law of S. Baker, (and also tenant in fee under a settlement,) that if Collier was entitled to be allowed the 1,150*l.*, that they were entitled to stand in his place as to the sums recovered upon the policies. But the Vice-Chancellor held, 1st, That upon the contract with Collier, the 29th of September was the period upon which the contract for the conveyance was to be completed, and that Susanna Baker having survived that period, Collier was entitled to the 1,150*l.* to be allowed on that event, and that he was also entitled to the 1,100*l.* secured upon the policy, no equity attaching upon it in his hands in favor of the plaintiffs. The case of a tenant for life of premises insuring from fire and afterwards burnt down, was pressed in argument, and it was urged that the tenant in remainder might have an equity to compel a tenant for life to rebuild, or at least to be entitled to the proceeds of the policy for that purpose, on payment of the premiums and interest; but the Vice-Chancellor answered, that the point had never been decided, but that he thought there was no such equity.[1]

§ 398. 2. Where, however, a contingent interest is assigned in trust by way of security for a debt, and the assignee insures in respect of the contingency, and upon its happening receives the sum insured, it has been held, that, upon the bankruptcy

[1] See Leeds *v.* Cheetham, 1 Sim. 146, *ante*, p. 82.

of the debtor, the sum so recovered must be deducted from the proof, for an equity attaches upon it in the hands of the assignee as a trustee.[1] S. E. was indebted to C. E. and T. E., and being entitled in right of his wife to 400*l.* and upwards, in the event of her surviving her mother, he and his wife assigned to C. E. and T. E. that contingent interest upon *trust* after the payment of their costs and expenses, and to retain their debts, or as far as it would extend, and to pay the surplus, if any, to S. E. The debts owing to them respectively exceeded the amount of the contingent interest. After the execution of the deed, C. E. and T. E. at their own expense, and without the privity of S. E., effected policies of insurance in 200*l.* each on the life of the wife; the wife died, and C. E. and T. E. received the amounts of their respective insurances. Shortly afterwards a commission of bankruptcy issued against S. E., and C. E. and T. E., being both of them creditors of S. E. beyond the amount which it was the object of the assignment to cover, severally proved the *whole* of their debts under the commission, without noticing or deducting the two sums of 200*l.* each received upon the insurance, and this was a petition to expunge those sums from their proofs. In support of the petition, Godsal *v.* Boldero was cited.[2] The Vice-Chancellor (Sir T. PLUMER) — "Upon the argument this case was assimilated to that of Godsal *v.* Boldero, of which it is the converse; here the party has recovered not his debt, but the value of the risk insured by his policy. But it is said, that inasmuch as in that case the transactions were blended, payment by the executors absolving the office, so, *e converso*, payment by the office discharges the debt; it does not, however, necessarily follow, from the court deciding that the party, having been paid by the executors, could not recover from the office, it could not recover from the executors. The contract with the insurance office is a contract of indemnity, legal only

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[1] *Ex parte* Andrews, 2 Rose, R. 410; 1 Mad. Ch. R. 572, S. C.

[2] 9 East, R. 72, cited *ante*, § 305.

as an indemnity commensurate with the interest of the insured. The contract is an indemnity from loss, and there was no loss; that case, therefore, though it bears upon this question, does not conclude it. Another point arises on the assignment, which must decide this case. The assignment has placed C. E. and T. E. in the situation of trustees. The bankrupt and his wife conveyed their contingent interest to them as *trustees* to act for them, with indemnity against expenses, and covenanting not to interfere, in short, expressly transferring their whole right and title. From the date of this instrument, the bankrupt and his wife could not themselves have insured in respect of their property: they no longer had an insurable interest. The trustees acting in part for themselves, in part for the bankrupt, do an act beneficial to both parties, at their own expense ameliorating the property, laying out money for the benefit of themselves and their *cestui que trust.* The result of the act is, that the estate is benefited 400*l.* — shall they be allowed exclusively to appropriate this benefit? It is clear that a trustee never can use to his own benefit the property committed to his trust; as in the common instance of the renewal of a lease. Although it appears that the lessee would not have renewed with the *cestui que trust*, yet the trustee making a contract for himself, and with his own money, cannot set up a title adverse to that he has undertaken to protect. That is not precisely the present case, because here the insured had an insurable interest; but they had it subject to all the jealousy with which the court regards a trustee acting on the property for his own benefit. They never would have insured, unless the property had been assigned to them. The means, therefore, of acquiring the sum received from the insurance office, originate with the bankrupt and his wife. They divest themselves of all dominion over it, by committing it to trustees. It is extremely difficult to maintain that they as trustees being allowed this payment, are not to account for it as an advantage made of fiduciary property, acquired partly by their own act and partly by the act of the bankrupt. Having thus by the act

of the bankrupt been enabled to obtain part of their debt, they cannot prove the whole. They must account. Being allowed what they have expended, including the premium, the surplus must be deducted from the proof."

CHAPTER XX.

RETURN OF PREMIUM, AND RECOVERY BACK OF LOSSES IMPROPERLY PAID.

§ 399. The premium is a sum of money paid by the assured to the underwriter, in consideration of his taking upon himself *a risk*, the risk of having to indemnify the assured from any loss that may be sustained by an exposure to the perils of the sea, and to fire upon land, or the event of death.[1] *Risk*, therefore, assumed by the underwriter on the one side, and the premium paid by the assured as the price of that risk,[2] are, in the language of Marshall,[3] "correlatives, whose mutual operation constitutes the essence of the contract of insurance." And hence, as Lord Mansfield has expressed it,[4] — "There are two general rules established applicable to this question; the first is, that where *the risk has not been begun*, whether this be owing to the fault, pleasure, or will of the assured, or any other cause, the premium shall be returned; because a policy of insurance is a contract of indemnity; the underwriter receives a premium for running the risk of indemnifying the assured; and, to whatever cause it may be owing, if he do not in fact run the risk, the consideration for which the premium was put into his hands fails, and, therefore, he

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[1] See *ante*, Introd. § 1 – 9.

[2] See 2 Arnould on Ins. 1210; 2 Phillips on Ins. Chap. XXII.; Hughes on Ins. 442.

[3] Marsh. on Ins. 648.

[4] In Tyrie *v.* Fletcher, Cowp. R. 666; and see Penson *v.* Lee, 2 Bos. & Pull. R. 330.

ought to return it." So that where a marine policy divides a voyage into distinct risks, affixing a separate premium for each, and after the first risk the vessel is destroyed by the misconduct of the assured, whereby the other risks are not incurred, the assured may recover the premium paid for such other risks.[1]

§ 400. But it appears that the doctrine at one period held, that when a policy is void on account of *actual fraud* in procuring it, the premium must be returned, is now overruled; and it is understood to be now settled in England,[2] that in cases of actual fraud by the assured the premium cannot be recovered back.[3] Ellis says,[4] that if the contract became void by the fraud of the assured, or his agent, the premium will not be recoverable.

§ 401. The rule that the premium must be returned, though there is *fault*, but no *fraud*, by the assured, was applied in a case of fire insurance, in which the representation made was, that no lamps were used in the picking room of a

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[1] Waters *v.* Allen, 5 Hill, (N. Y.) R. 421.

[2] See Whittingham *v.* Thornburgh, 2 Vern. R. 206; Prec. in Chan. 20; De Costa *v.* Scandret, 2 P. Wms. R. 170; Wilson *v.* Ducket, 3 Burr. R. 1361.

[3] Waters *v.* Allen, 5 Hill, (N. Y.) R. on p. 424. Tyler *v.* Horn, and Chapman *v.* Fraser, Park on Ins. 3d Lond. edit. 218, and Marsh. on Ins. 652. And see 2 Phill on Ins. p. 524, 525, sec. 1844 and 1845.

[4] Ellis on Fire and Life Ins. 141. Where the insurance was void on account of a fraudulent concealment of a letter containing information which would *unquestionably have prevented the underwriter from taking the risk*, the assured was held not to be entitled to a return of the premium. The court said, — "The underwriter had a right to the information. The withholding it from him must be considered fraudulent, and the insurance was, therefore, void. And being avoided for such a cause, the plaintiff is not entitled to a return of his premium." Hoyt *v.* Gilman, 8 (Mass.) R. 336.

manufactory, and lamps had been suspended, and occasionally had been used there for several years, the court held that the policy did not attach, and ordered that the premium be returned. But if the lamps, it was considered by Mr. Justice WOODBURY, had been *fraudulently* used there in disregard of the representation, the premiums should be retained by the company, but it appeared from the circumstances the assured was so misled in their use as to repel any presumption of fraud.[1]

§ 402. Duckett *v.* Williams[2] was a case of a Life Policy. It appeared that the defendants, who were the directors of the Hope Insurance Company, had obtained a verdict in an action brought against them upon a policy of insurance on the life of a Mr. S. effected by the plaintiff. The party assured had falsely represented the state of his health to the office, but the plaintiff was not aware, as it appeared, of the real condition of the assured's health, who had been laboring under a disorder of a virulent nature, which caused his death shortly after the insurance was effected. The plaintiff afterwards moved for a new trial, with a view to recover back the premium, which the court granted on payment of costs. It is to be observed that *there was a clause in the policy*, that if the facts required to be set forth were not *truly* stated, all moneys paid thereon should be forfeited. It was contended that the words must mean, truly or untruly, *within the knowledge of the party* making the statement, and that if the assured *ignorantly* and *innocently* makes a misstatement, he is not to forfeit the premium under the *clause of the agreement.* But the court held that was not the true meaning of the words, and that the knowledge of the party was immaterial.

§ 403. According to the general principles of insurance,

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[1] Clark *v.* Manufacturers' Ins. Co. 2 Wood. & Min. (Cir. Ct.) R. 472.

[2] Duckett *v.* Williams, 1 Tyr. R. 240 ; 2 Carr. & Marsh. R. 348.

whenever the risk to be run is *entire*, there is no return of premium, though the contract should cease and determine the next day after its commencement. This rule applies to insurances against fire, which generally are made for one entire and connected portion of time, which cannot be severed; and, therefore, if the property insured should be destroyed by fire, arising from the act of a *foreign enemy*, the very day after the risk had once attached, there can be no return of premium.[1]

§ 404. As in Fire policies, so in policies of insurance on Lives, where the risk is *entire*, there is no return of premium, though the policy should determine the next day. If, however, the risk has never been begun, from whatever cause, (with the exception of fraud, or an express stipulation,) the premium, as appears by the general law of insurance, shall be returned, the policy of insurance being, as has been stated, an indemnity.[2] The underwriters receive the premium for running the risk of indemnifying the assured, so that, if they run no risk, and no fraud be imputable to the party assured, the consideration for which the premium was paid (as in Marine and in Fire insurance) fails.[3]

§ 405. The most simple case of return of premium is from the failure of the *interest*.[4] Where the assured has no interest covered by the policy, either because the interest in respect to which he insures is only a bare contingency or expectation, and not an insurable interest,[5] he is entitled to a return of pre-

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[1] Ellis on Fire and Life Ins. 23, citing Lowry *v.* Bordlieu, Doug. R. 468. So if a policy upon a vessel attach for but one single moment, there is no return of premium. Waters *v.* Allen, 5 Hill, (N. Y.) R. 421; Hendrics *v.* Commercial Ins. Co. 8 Johns. (N. Y.) R. 1.

[2] See *ante*, Introd. § 1, *et seq.*

[3] Ellis on Fire and Life Ins. 141.

[4] Hughes on Ins. 442; and see opinion of Lord Mansfield in Lowry *v.* Bordlieu, Doug. R. 688.

[5] See *ante*, Chap. IV. and XIV.

mium.[1] The rule in fact has been, and is, in relation to *marine* insurance, that if through mistake, misinformation, or any other innocent cause, an insurance be made without any interest whatsoever, the assured is entitled to recover back the whole premium.[2] In marine insurance, if the risk have once commenced, there can be no return of premium in respect to its greater or less *duration*, and the reason is, that the risk cannot be calculated by duration, (*i. e.*, it may be as great in a day as in a month); but it is otherwise with the *amount* of the insurable interest, or the *value* at risk.[3] In a case of a *fire* policy, made through mistake, Mr. Phillips[4] considers that the premium may without doubt be reclaimed for want of interest, no less than under a marine policy; and that this results from the doctrine that gaming policies are illegal, and the necessity of proof of interest under such a policy.[5]

§ 406. If *fraud* be committed *by the underwriters*, the premium may be recovered back;[6] as where an insurance company underwrites, knowing, at the time, of the arrival of the property.[7] It has been laid down as clear law by Lord Mansfield, that if the underwriter has been guilty of fraud, an action lies against him, at the suit of the assured, to recover the premium.[8]

§ 407. If the contract is void on account of *illegality*, the assured is not entitled to a return of premium, upon the prin-

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1 2 Arn. on Ins. 1225; 2 Phill. on Ins. p. 504, sec. 1824; Routh *v.* Thompson, 11 East, R. 428.

2 Ibid. and Emerigon, Ins. Ch. XVI.; Finney *v.* Warren Ins. Co. 1 Met. (Mass.) R. 16.

3 Arn. on Ins. *ub. sup.*

4 2 Phill. on Ins. p. 507, § 1828.

5 See *ante*, Chap. IV. and XIV.

6 Ellis on Fire and Life Ins. 141; Duffell *v.* Wilson, 1 Camp. R. 404.

7 Phill. on Ins. p. 525, sec. 1845.

8 Carter *v.* Boehm, 3 Burr. R. 1909.

ciple which has been before stated, that where parties are in *pari delicto*, neither has a remedy against the other.[1]

§ 408. OF THE RECOVERY BACK OF LOSSES IMPROPERLY PAID. As the assured may recover back the premium where no risk has been run by the *underwriter*, so the latter may recover back the amount paid, if paid by mistake, and under circumstances in which the assured is not estopped from reclaiming it; the law raising a promise to repay it, on which an action of assumpsit will lie.[2] As where a loss was paid to a mortgagor, but on subsequent discovery by the underwriter that the policy was effected to cover only the interest of the mortgagee, he recovered back the excess.[3]

§ 409. If, after a loss has been paid, the insurers discover that there was fraud in the original contract, or that there were circumstances attending the loss, which, if known at the time the loss was claimed and paid, would have justified their resisting the demand, they may, it appears, maintain an action for money had and received to their use, to recover back the sum improperly demanded and paid; but if at the time they paid the money, they knew, or might upon inquiry have been informed of the grounds upon which they could have resisted the claim, they cannot afterwards recover it back, for this would open a door to infinite litigation. It seems too, as Marshall conceives,[4] that if even after the insured has recovered the loss by *process* of *law*, the insurers receive intelligence of *fraud* which they could not possibly have known whilst the suit was depending, they may in that case maintain an action to recover back the money.[5] If money be actually *paid*, it cannot be recovered back without proof of *fraud*; but a *pro-*

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1 *Ante*, § 29; and 2 Phill. on Ins. p. 526, sec. 1846.

2 2 Phill. on Ins. p. 600, and sec. 1997.

3 Irving *v.* Richardson, 2 B. & Ad. R. 193.

4 2 Marsh. 740; Bilbie *v.* Lumley, 2 East, 469.

5 Emerigon, Chap. IV. § 6.

mise to pay, as by an adjustment, is not binding, unless founded on a previous liability.[1] These observations, though applied by the learned writer to marine insurances, appear to be equally applicable in principle to insurance against fire.

§ 410. But a mistake of the law is not a ground for recovering back a loss,[2] as where a letter containing material intelligence had not been disclosed to the underwriter before subscribing the policy, but was shown to him before payment of the loss, it was held that he could not recover it back, for he had paid it upon a full knowledge of the circumstances, having all the necessary means of forming an opinion upon his liability.[3]

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[1] Per Lord Ellenborough, Herbert *v.* Champion, 1 Campb. 134.
[2] 2 Phill. *ub. sup.*
[3] Bilbie *v.* Lumley, 2 East, R. 469.

CHAPTER XXI.

OF THE CONSTITUTION OF INSURANCE COMPANIES, AND OF PREMIUM NOTES.

§ 411. Associations for the purpose of prosecuting the business of insurance are in England commonly constituted under deeds of settlement merely,[1] but in the United States they are generally, if not universally, constituted and regulated by a charter of incorporation. Whether or not a company transacts marine, or fire, or life insurance, the general management varies but little, although, in detail, each department requires calculations peculiar to it; and the funds of each are kept entirely distinct. In marine and fire insurances, (unlike those of life risks, which are the result of calculations based on the averaged operations of natural laws,) the contingencies are sudden and entirely uncontrollable, and, therefore, require a larger protecting capital; and hence they are not deemed so profitable as life insurance, and demand a somewhat different arrangement in the creation of capital.[2]

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[1] Wordsworth on Joint Stock Companies; and see *ante*, § 8, 9. "These English companies are mere partnerships, under the general license of the law that any person capable of contracting may insure. But the formation of similar companies, since November 1, 1844, has been controlled and regulated by a recent statute. The other English insurance offices have either been incorporated by royal charter, or invested with peculiar powers by private acts of Parliament." Dowdeswell on Fire and Life Ins. 22.

[2] James on Life and Fire Ins. 14. This writer proceeds to say, — "Such is the varying risk in marine and fire assurances, that a permanently subscribed or guaranteed fund is absolutely requisite, unless the business be very extensive, or long established; whereas in life assurance, the capital may only be maintained for a given period; involving, in the former case,

§ 412. With reference to the practical constitution and conduct of insurance companies, they have been divided into Mutual Companies, Proprietary Companies, and Mixed Companies.

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the necessity of a continuing and responsible joint-stock proprietary; and in the latter, but a restricted and temporary one, — a result evidenced by the fact, that many Marine and Fire Assurance Companies have, through the extraordinary pressure of losses, been obliged to suspend their business altogether; but *few*, doing life-business only, have been reduced to the same alternative. We have heard it emphatically stated by a gentleman, to whom the public are greatly indebted for his valuable professional exertions in its cause, 'that life assurance, if conducted upon sound principles, and even but on a comparatively limited scale, cannot fail to be profitable.' It may not be improper here to observe, that the calculation of the risk in life assurance proceeds, — first, upon the value of the risk in any particular year; and secondly, on the chance of the risk being determined by the death of the party (of course when the policy is taken out for a specified period, or for the whole life) in one of the preceding years of the term of assurance. In fire policies, however, this second element of the calculation is omitted; so that here, each year has its separate and independent risk, and consequently each year may be considered to commence an independent contract; whereas, in life policies, on the contrary, the mode of calculation gives the ground of a contract for the whole term of assurance as one integral risk, which being valued, the value (so previously ascertained) is subsequently for some collateral purposes, (such as the convenience to insured parties, of extending the premium over a lengthened period by small sums, instead of making it in one present large amount,) divided into annual, or other more frequent instalments."

"Excepting in the more scientific adjustment of premiums, by which a reduction in their amount is secured, Marine and Fire Assurances have not attained any particularly striking additional feature since their first introduction, other than the compensation for loss occasioned by lightning, or by hail-storms, and hurricanes, which may not be improperly considered as an appendage to these classes of risks."

"Property in ships on the high seas is insured against fire by the usual shipping policy; therefore it is not usual to insure such property by a separate fire policy. So life policies are not taken out on live farming stock, (as against fire risks,) they being insurable as goods by fire policies, and fire policies cannot include loss of life of servants by fire; the case, however, would be different in foreign plantations, where the slave-trade still con-

§ 413. A Mutual Insurance Company in its origin was a body of persons, each of whom was desirous of effecting an insurance, and he agreed with the rest of the members to contribute his premiums to a common fund, on the terms that he should be entitled to receive out of that fund.[1] A Mr. Simpson, an eminent mathematician and lecturer, recommended, in 1762, the formation of a life company, called the "Society for Equitable Assurance." This was to be conducted on a plan altogether different from the Proprietary, and, until then, novel, it being upon what is now called the mutual principle, according to which the persons assured are alike participators in the profits and losses of the concern. Although the idea which was at first entertained of this new system was unfavorable, the society just named has proved to be one of the most successful in its operations.[2] A modification of the principle has been recently introduced, wherein a protecting capital is guaranteed for a specific period, or until the business of the company, and the income accruing, are of a sufficient amount to secure the absolute payment of the total sums insured under the existing policies, when such guarantee is withdrawn.[3] The whole body becomes reciprocally bound to make good the losses, and are literally mutual insurers. The instances of offices undertaking fire business on the mutual principle in England are much less common than in the United States; but those offices which have been in being in England have been successfully conducted, and, as may be expected, they very wisely reject risks of a very hazardous description.[4]

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tinues, and the life of the laborer is considered to be the property of the slave-owner. Until recently, Life Assurance, properly speaking, was confined to the human race; it now however extends to risks on the existence of the brute creation, comprising those animals necessary for our domestic purposes, and forming no inconsiderable portion of the property of the agriculturist."

1 Dowdeswell, 22.

2 Blaney on Life Insurance, 5, 7.

3 James on Life and Fire Insurance, 15.

4 Ibid.

§ 414. The Proprietary Insurance Company consists of a body of shareholders, who guarantee the full payment of insurances to the policy-holders, but retain the entire profits of the business.[1] In these companies the person assured ceases to have any interest in the premiums; they become the property of the insurers as the price of the insurance, who are at liberty to apply them in whatever manner they think proper.[2]

§ 415. Mixed Companies differ from Proprietary Companies only in the circumstance that the company agrees, in consideration of the payment of an increased premium, that the assured shall be entitled to receive a proportion of the profits of the business by way of *bonus*.[3] By this arrangement the advantages of both systems are combined; security for insurances, on the one hand, and the personal irresponsibility of the policy-holders on the other; and where a participation of profit is preferred, this benefit is secured by but a trifling increase in the amount of premiums.[4]

§ 416. In mutual companies there is no proprietary body distinct from the assured; the latter share among themselves the whole profits of the concern, after deducting the expenses of the management; and the assured being a member of the company, is bound to take notice of its by-laws.[5]

§ 417. The business of Life Insurance, as now carried on, may be classed under the following general heads: namely, insurance for *life* or *years; contingent* insurance, or the insurance of one life against another; and *survivorship* insur-

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1 James on Life and Fire Insurance, 15.
2 Dowdeswell on Life and Fire Insurance, 25.
3 Ibid.
4 James, 16.
5 See *ante*, § 10.

ance, or the insurance of the payment of a certain sum on the death of one of the two parties assured.[1]

§ 418. The *mode of proceeding* by a mutual company has been for each party to pay a sufficient portion of the premium in cash, to meet the current expenses, and to give a note, called the *Premium Note*, for the residue. Such a note is a part of the company's capital, and the directors are bound to call in a sufficient amount upon all such notes held by the company to pay the assured losers. When a loss by fire takes the entire funds of the company, the losers have an immediate vested interest in the effects of the company.[2]

§ 419. The maker of a premium note given to a mutual insurance company, for the security of dealers, under a legislative act applicable to this class of companies, is entitled to be credited, upon such note, the amount of premiums upon policies issued to others, or covering the interest of others, whom he has influenced to insure with the company. He is not restricted to policies issued to *himself*, and covering his own interest as an insurer. The object of the *novel* security provided by such an act is to provide a substitute for capital stock, by inducing capitalists and business men to lend their credit to the mutual companies. The inducements held out to the makers of the notes were, first, a per centage for the use of their credit; and, secondly, a gradual extinction of the liability, by payment of a corresponding amount in premiums on policies to be issued by the company receiving the notes.[3] As was elaborately and well illustrated by the late Chief Justice JONES, these companies could not hope for public patronage on the security of the premiums on the half million of dollars of insurance with which most of them were to com-

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[1] Blaney on Life Assurance, 7.

[2] Rhinehart *v.* Alleghany Mutual Ins. Co. 1 Barr, (Penn.) R. 359.

[3] Emmet *v.* Reed, 4 Sand. (N. Y.) Sup. Ct. R. 229; Brouwer *v.* Appleby, 1 Ibid. 158; Merchants Mutual Ins. Co. *v.* Leeds, 1 Ibid. 184.

mence operations. A large amount of subscription notes, under the twelfth section of the act in question, (the controlling feature of the act,) was indispensable to a favorable beginning.[1]

§ 420. A premium note deposited with a mutual insurance company, *as security*, is a valid promissory note, and may be used by the company in the payment of a loss; and such note may be transferred by the president of the company, without the previous resolution of the board of trustees, authorizing the transfer.[2]

§ 421. Where the charter of a mutual insurance company authorizes such company, "for the better security of its dealers," to receive premium notes in advance, of persons intending to take policies, and to negotiate such notes for the purpose of paying claims or otherwise, in the course of its business, and to pay to the makers of such notes a compensation not exceeding five per cent. per annum, on so much of the notes as exceeded the premiums on policies actually taken; a note taken by the company in pursuance of its charter, for premiums in advance, is valid and effectual for the whole face thereof, although the premiums on insurances actually received by the maker amounts to only a part of such note. And if such note be *pledged* by the company as security on an ad-

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[1] Hone *v.* Allen, 1 Sand. (N. Y.) Sup. Ct. R. 171, (note.) In this case the amount was $250,000; being thirty times more than the amount of premiums written, upon which the company there in question was entitled to organize.

[2] Aspinwall *v.* Meyer, 2 Sand. (N. Y.) Sup. Ct. R. 180. A note given for the premium of insurance, on taking out an *open marine* policy, becomes valid as fast as the risks are assumed on the policy, to the extent of the premiums thereby earned, and is transferable, like other notes; and there is no implied agreement on the part of the insurers to retain it till due, so as to be then subject to the adjustment of losses. Furniss *v.* Gilchrist, 1 Sand. (N. Y.) Sup. Ct. R. 53.

vance of money to its full amount, which advance the company is unable to repay, the party to whom the note is so pledged may recover the amount thereof, in an action against the maker.[1] The principle of the two cases just referred to at the bottom was re-affirmed in the case of the Croton Company.[2] That company was organized under its charter, and commenced business in 1844. In 1846, the defendants and others subscribed an agreement with the company, by which, after reciting that it was expedient to increase the subscription notes to the company, they undertook to give promissory notes for the amount set opposite their respective names, for the protection of persons to be insured, and to encourage others to do their business with the company, *which notes were to be in advance for premiums on policies of insurance, which they agreed to take thereafter.* In pursuance of this agreement, the defendants gave their notes to the amount of five thousand dollars. The company continued to issue policies in the ordinary way of its business to a large amount, upon which losses happened, and remained unpaid. The defendants, however, after the giving of their notes, took out no policies, and they resisted the payment of the notes, on the ground that they were without consideration. But the court held that, under the provisions of their charter, the notes were valid, and that the receiver of the company (which had become insolvent) was entitled to collect the amount thereof, to be applied in the liquidation of losses and liabilities.[3] It has been held in Indiana, that if the charter be wholly silent as to the power of the insurance company to give credit for premiums, and to take notes in payment, such a power necessarily results from

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[1] Deraismus *v.* Merchants' Mutual Ins. Co. 1 Comst. (N. Y.) R. 371; Crooke *v.* Mali, 11 Barb. (N. Y.) Sup. Ct. R. 205; and see Howland *v.* Myer, 3 Comst. (N. Y.) R. 290.

[2] Brown, Receiver, *v.* Crooke and Fowk, 4 Comst. (N. Y.) R. 51; and see Brouwer *v.* Hill, 1 Sand. (N. Y.) Sup. Ct. R. 629.

[3] Verplanck *v.* Mercantile Ins. Co. 3 Paige (N. Y.) Ch. R. 438.

its power to make insurances, and to enable it advantageously to conduct its business.[1]

§ 422. By the charter of the Chenango County Mutual Insurance Company, upon a sale of insured property, the policy became void, and the assured was entitled to have his deposit note surrendered and cancelled, *on paying his proportion of the losses then incurred.* Under this provision the defendant surrendered a policy which he held from the company, and the secretary of the company cancelled and surrendered the deposit note. At the time of the surrender, there were contested claims for losses against the company, some of which were subsequently established, and the receiver appointed by the court made an assessment upon a class of deposit notes, including that of the defendant, for the purpose of defraying such claims. The note had been given up without the payment of any thing toward the losses, but there was no proof of fraud, or of any mistake of fact in regard to the existing claims against the company. The surrender, the court held, was a valid transaction, and that the receiver could not maintain an action on the note.[2] "When the parties," said BRONSON, C. J., "have come to an agreement, and the policy and the note have been surrendered, the individual ceases to be a member of the company; and all right to make assessments or calls upon him, or upon the note, is at an end. The settlement and surrender of securities are acts authorized by law, and, like other lawful acts, they are binding upon both parties, unless they can be impeached on the ground of fraud or mistake."[3]

§ 423. It has been held in Pennsylvania, that where property insured is destroyed by fire, to so great an amount that

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[1] McIntyre *v.* Preston, 5 Gilm. (Ind.) R. 48.

[2] Hyde, Receiver of the Chenango Mutual Ins. Co. *v.* Lynde, 4 Comst. (N. Y.) R. 387.

[3] Neely *v.* Onondaga Co. 7 Hill, (N. Y.) R. 49.

all the deposit notes, and one per cent. and all the property insured, is no more than sufficient to pay the losers; and afterwards, before the deposit notes are collected, another fire destroys other property insured in the same company, the losers by the latter fire are not entitled to any part of the fund arising from the notes, and one per cent. assessed.[1]

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[1] Coston *v.* Alleghania Mutual Ins. Co. 1 Barr, (Penn.) R. 322.

CHAPTER XXII.

OF THE CONTRACT OF INSURANCE IN CONNECTION WITH OTHER CONTRACTS AND OBLIGATIONS.

§ 424. In exhibiting the miscellaneous class of decided cases denoted by the above inscription, it is proposed first to notice some which have occurred in England, and secondly some which have occurred in our own country. Introductory to the former, we offer an interrogatory of an English writer,[1] which reads thus: — It is said that a policy (of fire insurance) is not a covenant *running* with the land, nor in any way concerning the realty. But if a man, having a freehold estate of inheritance in a house, were to die, leaving no property other than the freehold-house, and an unexpired policy of insurance on the house, would the policy constitute *bonâ notabilia* within the jurisdiction of the English Spiritual Courts, or would it be considered as accompanying the realty?[2]

§ 425. Money recovered upon a loss by fire under a policy, was held to follow the uses of a settlement of the real estate, which comprised the house burnt down. The settlement was to the use of J. B. for life, remainder to W. B. for life, remainder to J. B. in fee. The money had been paid to J. B., who placed it in the funds instead of rebuilding the houses, but he left a memorandum that the money so invested was recovered for a loss on the settled property.[3]

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[1] Beaumont on Fire and Life Ins. 73.

[2] See *ante*, Introd. § 11, and Treat. §§ 193, 199, 200.

[3] Norris *v.* Harrison, 2 Mad. Ch. R. 268.

§ 426. So where in an annuity charged on the real estate under the will, the executrix had renewed a policy of insurance taken out by the testator previously to date of his will, upon a house, the only real estate of the testator; upon a bill for an account filed by the annuitant, the proceeds of the insurance were decreed to be paid into court as trust moneys liable to the annuity for lives.[1] Where a testator bequeathed two policies of insurance by his will on certain trusts, and after making his will received the money on the respective losses happening under the policies, this was ruled to be an ademption of the legacy.[2]

§ 427. There is another case cited by Beaumont, which will be here cited, for the double purpose of showing that a policy of insurance may be the subject of the usual limitations of real estate, and that the accretions or profits added to the policy (according to the rules of the insurance company so distributing their surplus capital among the insured) follow the uses of the settlement. By the marriage settlement of the daughter, a policy on her father's life was vested in trustees, and power to dispose of the policy by will was given to the daughter. She bequeathed this accordingly in three portions. It was held to pass accordingly. The policy was for 3,000*l.*, and in the settlements and will it was described as "the sum of 3,000*l.* for which A's life was insured," and by the will 1,000*l.* was the amount of each portion. 9,000*l.* was received under the policy by the addition of bonuses. It was decided by the Vice-Chancellor, Sir J. Leach, that the 9,000*l.* passed by the will, and 3,000*l.* passed by each bequest of "1,000*l.*, part of the sum of 3,000*l.*"[3]

§ 428. When an annuity, with which as a collateral secur-

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[1] 3 Simons, Ch. R. 77; Parry *v.* Ashley.

[2] Barker and Wife *v.* Raynor, 5 Madd. Ch. R. 208.

[3] Cited in Beaum. on Fire and Life Ins. 75.

ity a policy on the grantor's life is taken out by the grantee, is paid off, the premiums of insurance are not recoverable by the grantee against the grantor of the annuity, unless in the grant of annuity there were a stipulation to that effect.[1] When the grantor of an annuity becomes bankrupt, a policy on his life, taken out by the grantee, will be directed to be sold; the proceeds of the sale, after payment of expenses, to go "in payment to the grantee of what shall be due to him in respect of his payment for premiums and interest, and also in respect of the value of the said annuity, and the arrears thereof, as far as the same will extend to pay and satisfy;" the grantee is then allowed to prove for the remainder under the commission.[2]

§ 429. Proof on policies, where the loss has not yet happened, may be made by the creditor holding the policy at the time of bankruptcy of the debtor: this was settled in Cox *v.* Listard, (before cited).[3]

§ 430. The executor, and not the heir, (though the houses descend to the heir,) is entitled to recover where the policy is made payable to one of his executors, administrators, and assigns, which is the usual form.[4] It is sometimes provided, by the deed of constitution of insurance companies, that policies shall be considered personal estate.[5]

§ 431. Where there is a partnership, and one of the partners is, under the articles of partnership, constituted sole

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1 Burder *v.* Browning, 1 Taunt. R. 522. See 5 Ves. R. 620, 623. Where the annuity is higher in consequence of the insurance, this is not usurious. Holland *v.* Pelham, Exch. R. June 8, 1831.

2 Tiernay, *ex parte*, 1 Mont. R. 78.

3 Dougl. R. 166, note.

4 Mildmay *v.* Folgham, 3 Ves. R. 472.

5 Beaumont, p. 76.

owner of the building, and he takes out an insurance, and the house is burnt down; under a commission of bankruptcy against the partners, the money recovered under the policy is considered the separate estate of that partner.[1]

§ 432. Where a trader assigned to a creditor, as security for his debt, a contingent interest, limited on the event of his wife surviving her mother, and the creditor insured the life of the wife, and she died, and the husband subsequently became bankrupt; the creditor's proof, under the commission, was limited to the difference between the sum recovered on the policy, and the full amount of his debt. The sums paid by him for premiums on the policy were also allowed in the account.[2]

§ 433. In a case where a debt was contracted by the bankrupt after the bankruptcy, and the creditor then took out a policy on the life of the bankrupt, and, on the life determining, recovered from the insurers, declaring in the action, on two counts, under the first as for an interest in himself, and under the second count as for an interest in the assignees, and he recovered on the second count, on an action by the assignees to recover from him the sum paid by the insurers, it was determined that the action was not maintainable by the assignees.[3]

§ 434. So there is no lien, for part of purchase-money unpaid, on a policy taken out by the purchaser of goods or houses.[4] There is a case cited by Beaumont, where the mortgagee, for a term dependant on a life, insured on that life to the amount of the mortgage-money, and recovered from the

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[1] *Ex parte* Smith, Buck. R. 149; 3 Mad. Ch. R. 63.

[2] *Ex parte* Andrews, 1 Mad. Ch. R. 574.

[3] Grant *v.* Atkinson, 4 Taunt. R. 380.

[4] Neale *v.* Reid, 1 B. & C. 661; 3 Dowl. & Ryl. R. 158, S. C. See 2 Stark. R. 401, 402.

insurers, having previously entered into a further contract with the mortgagor for purchase of the fee at a certain price, with a proviso that the amount of the life-interest should be deducted from the price of the fee simple. It was decreed by the Vice-Chancellor that the mortgagee should have the deduction of the value of the life-interest, and should also retain the sum which he had recovered from the insurers under his policy taken out in that life, and that the vendors were not entitled to any benefit under such policy.[1]

§ 435. A promise to procure an insurance to be effected, makes the party promising liable in case of loss without an insurance having been effected according to the promise.[2]

§ 436. Where it is among the conditions of sale of a life-interest that the life is insurable, any concealment of material circumstances will make void the contract. In this case the life was described in the particulars of sale, and at the sale, as "very healthy, aged 48," and "healthy gentleman, aged 48, whose life is insurable." The auctioneer stated "insurance to be guaranteed at five guineas per cent." Something, it was alleged, was also said about an allowance by way of abatement in the purchase money would be made if the insurance offices required a larger premium than five guineas, but this was afterwards taken out of the bill. Now it was proved that about four guineas was the usual premium on a good life of the age of 48; and it was argued for the vendors, that the stating that five guineas was the expected premium operated as notice to the purchasers that the life was not a good life. The defendants admitted that they knew that five guineas was greater than the premium for a healthy life, but denied that this was notice to them of the life being unhealthy. The court decreed that

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1 Watson *v.* Bruton, Sitt. after Hil. Term, 1830, cited in Beaumont; 78.

2 Wilkinson *v.* Coverdale, 1 Esp. R. 75; Wallace *v.* Telfair, 2 T. R. 188, n. And see *ante*, Chap. III. and Chap. XIX., § 381.

there was not notice to the purchasers as to the life being other than a good life, and dismissed the bill for enforcing specific performance of the purchase. In this case one surgeon stated the life was good in June, 1828, but he did not know as to the state of health in January, 1829: another medical man stated that it was good except as to rheumatism in November, 1828; other evidence went to prove that, except rheumatism, it was a good life in April, 1829; but it was proved that previously the party had had cowpox and the gout. He had a paralytic stroke in May; having been refused on an application to insure in the Guardian and the Equitable on the 2d April. The sale was in November, 1828.[1]

§ 437. A carrier is not liable for goods burned in his warehouse where they were left for the owners to take away when they pleased, being left there after notice of their arrival in the carrier's custody to the owners. One of these carriers having paid the loss, he was not entitled to recover from his partners any portion of the amount, or to make it a partnership transaction.[2]

§ 438. With regard to the relations of vendor and purchaser, where the property is destroyed by perils which are the subject of insurance, see Sugden's Vendor and Purchaser, cap. 5, sec. 2. It is shown, that by the rule in equity the loss falls on the purchaser after the agreement to purchase has been settled, but not where the purchaser has made objections to the title, which remain unanswered at the time of the loss. Where the sale is before a Master in Chancery the rule is different, the loss falls on the vendor and not on the purchaser, until the report of the sale has been absolutely confirmed,

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[1] Brealey *v.* Collins, 1 Young, Exch. R. 317.
[2] Wilkinson *v.* Coverdale, 1 Esp. R. 75.

even though an order *nisi* to confirm the report should have passed.[1]

§ 439. In the same section the rule is stated as to the case of an annuity on the life of vendor, granted by purchaser as consideration for the sale to him; here, if vendor die immediately, the loss falls on that party, not on purchaser. Whether an agreement to take a house and pay rent can be enforced where the premises are consumed by fire before the day appointed for the defendant's entry, is doubtful.[2] A covenant for quiet enjoyment does not extend to oblige lessor to rebuild in case of fire.[3]

§ 440. If a lessor covenant in a lease with his lessee to rebuild in case of fire, he is only bound to replace the premises as they were at the time of the lease, not with the additions made by the tenant.[4] A lessee who covenants generally to repair, is bound to rebuild it if it be burned by accidental fire, by lightning, or by the King's enemies.[5] Tenant for years is

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[1] The cases cited are 2 vol. Coll. of Decisions, p. 56; Paine *v.* Meller, 6 Ves. R. 349, reversing Stent *v.* Bailey, 2 P. Wms. R. 220; and White *v.* Nutt, 1 P. Wms. R. 62. References are there given also to 2 Vern. 280, and to Poole *v.* Shergold, 2 Bro. C. C. R. 118; Revell *v.* Hussey, 2 Ball & Beat. R. 280; Harford *v.* Purrier, 1 Madd. Ch. R. 532.

[2] Phillipson *v.* Leigh, Esp. R. 398; Paradise *v.* Jane, Aleyne, 26; Monk *v.* Cooyer, 2 Str. 763; 2 Ld. Raym. 1477; Belfour *v.* Weston, 1 T. R. 310; Doe *d.* Ellis *v.* Sandham, Id. 705, 710; Cutter *v.* Powell, 6 T. R. 323; Hare *v.* Groves, 3 Anstr. R. 687; Baker *v.* Holtpzaffell, 4 Taunt. R. 45; 18 Ves. 116. The above are affirmative. *Contra*, Brown *v.* Quiliter, Ambler, 619; Steele *v.* Wright, 1 T. R. 708, (cited). See also Weighall *v.* Waters, 6 T. R. 488; 2 Anstr. R. 575.

[3] Brown *v.* Quiliter, Ambl. R. 619, 620. See Bayner *v.* Walker, 3 Dow. P. C. 233.

[4] Loader *v.* Kemp, 2 C. & P. 375. *Quære* as to covenant of lessor to insure.

[5] E. Chesterfield *v.* D. Bolton, 2 Com. R. 627; Bullock *v.* Domitt, 6 T. R. 650; Dyer, R. 33; 2 Chitt. R. 608; Poole *v.* Archer, 2 Show. R. 401; Pym *v.* Blackburn, 3 Ves. R. 34; Co. Litt. 37, a, n. 1.

bound to rebuild in case of fire, though no covenant.[1] So where one holds over after his lease expired, though he hold over under a verbal agreement only, he is bound by the covenant to repair contained in the lease, and therefore must rebuild in case of fire.[2] If there be a covenant to repair, it is not limited to the sum mentioned in a subsequent covenant settling the amount to which insurance is to be effected.[3]

§ 441. In England a covenant to insure premises within the bills of mortality, as in 14 Geo. 3, c. 78, is a covenant running with the land.[4] Where the lessor had insured previously to the lessee insuring, under a covenant that the lessee should insure to the amount of two thirds of the value of the buildings, and in the joint names of the lessor and lessee: lessor claimed as for a forfeiture, the lessee not having insured in the joint names, but in his own name only: it was held that the lessor having done what would lead a reasonable and cautious man to conclude that he was doing all that was necessary as to insurance, could not recover for a forfeiture.[5] The statute 6 Anne, c. 31, which restores the common law as it was before the Statute of Gloucester, viz., taking away the liability of tenants for damage by accidental fire, does not prevent the liability to rebuild under the covenant to repair; nor the liability to continue to pay rent though the premises are lying in ruins by accidental fire.[6] But where accidents by fire are excepted, the covenant does not oblige lessee to rebuild:[7] the

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[1] Rooke *v.* Warth, 1 Ves. R. 462.

[2] Digby *v.* Atkinson, 4 Camp. R. 275.

[3] Ibid.

[4] Vernon *v.* Smith, 5 Barn. & Ald. R. 1.

[5] Doe *d.* Knight *v.* Rowe, 1 Ry. & M. 343; 2 C. & P. 246.

[6] Belfour *v.* Weston, 1 T. R. 310; Weighall *v.* Waters, 6 T. R. 488; Hare *v.* Groves, 3 Anstr. R. 687.

[7] Bullock *v.* Dommitt, 6 T. R. 651; 2 Chit. Rep. 608; Tempany *v.* Burnand, 4 Camp. R. 20; Brown *v.* Knile, Brod. & B. 395; 5 Moore, R. 164.

lessor is not bound to rebuild.[1] An injunction will not lie to stay an action for payment of rent while the premises are lying waste after fire:[2] even where there is an exception of accidents by fire in the covenant to repair, an injunction will not lie to an action for rent.[3] Where the landlord is bound to repair, and the tenant, from sudden accident, is compelled to make repairs, he may set it off as money paid to the use of the landlord in an action for rent.[4] A covenant to insure in "some sufficient insurance office" is not void for uncertainty, but means that the premises shall be insured in some office where such insurances are usually effected.[5]

§ 442. The Building Act (14 Geo. 3, c. 78, s. 83) provides, in respect of buildings within the weekly bills of mortality, that "It may be lawful for the directors and governors of the several insurance offices, and they are hereby authorized and required, upon the request of any person or persons interested in or entitled unto any house or houses or other buildings which may hereafter be burned down, demolished, or damaged by fire, or upon any grounds of suspicion that the owner, occupier, or any other person, &c., who shall have insured such house or other building, have been guilty of fraud, or of wilfully setting their house or other building on fire, to cause the insurance money to be laid out and expended, as far as the same will go, toward rebuilding, reinstating, or repairing such house or houses or other buildings so burnt down, &c.,

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[1] Bayne *v.* Walker, 3 Dow. P. C. 223.

[2] Belfour *v.* Weston; Baker *v.* Holtzapffell, 4 Taunt. 45; Hare *v.* Groves, 3 Anst. R. 687.

[3] Holtzapffell *v.* Baker, 4 Taunt. 45; Hare *v.* Groves, 3 Anstr. 687. But where the lessor has insured, and recovered from the insurers, an injunction until the house is rebuilt will lie to an action for rent; Brown *v.* Quiliter, Ambl. R. 619, 620. Where there is no exception of accidents by fire, an injunction will not lie; Leeds *v.* Chatham, 1 Sim. 149.

[4] Waters *v.* Weighall, 2 Anstr. R. 575.

[5] Doe *d.* Pitt *v.* Shewinn, 3 Camp. R. 134.

unless the party claiming such insurance money shall, within sixty days next after his claim is adjusted, give sufficient security to the governors or directors of the insurance office where such house or houses or other buildings are insured, that the same insurance money shall be in that time settled and disposed of to and amongst all the contending parties, to the satisfaction and approbation of such governors and directors."

§ 443. Secondly: We shall next proceed to offer decisions which have been made in our own country, which determine how the parties to other contracts are affected when the thing which such contract concerns happens to be also the subject of insurance; and we commence by alleging, that as policies against fire are personal contracts with the assured, the insurer cannot escape liability on the ground that the assured have not paid to third persons all he is liable to pay on account of the goods; for that is a matter with which the former have no concern. Where, for instance, *dutiable* goods imported and stored in the public stores are consumed by fire before the payment or security of the duties, the importer is entitled to recover against the insurer of such goods, and their value is to be estimated as if the duties had been paid. It is not competent for the insurer in such case to say to the assured, that the government will not probably enforce its claims on you, and, therefore, the insurer is not liable. It is enough that the assured became liable for the duties the moment the goods were imported; and the insurer cannot escape liability on the hypothesis that the government may possibly omit or neglect to insist upon its rights.[1]

§ 444. Where a mortgagee, at the request of the mortgagor,

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[1] Wolfe *v.* Howard Insurance Co. 1 Sand. (N. Y.) Sup. Ct. R. 124; United States *v.* Lyman, 1 Mason, (Cir. Ct.) R. 482; and see Knox *v.* Dennis, 5 Ibid. 380.

effects insurance on the premises mortgaged, and pays the premium, the premium so paid will, on bill for foreclosure, be a charge upon the premises, in addition to, and equally with, the original debt.[1]

§ 445. The owner of an estate insured by a mutual fire insurance company, mortgaged the estate, and, at the same time, with the assent of the underwriters, transferred the policy of insurance to the mortgagee by an assignment, which was absolute in terms, and expressed to be for a valuable consideration, but intended only as security for the mortgage debt; and the mortgagee afterwards assigned the mortgage, with the debt thereby secured, and with the policy of fire insurance, by an absolute assignment, assented to by the underwriters, and for a valuable consideration paid by the assignee. The debt secured by the mortgage having been subsequently paid in full to the assignee by an assignee of the mortgagor, and the mortgagee thereupon discharged; and the assignee of the mortgagee, after the expiration of the policy, having received the return premium thereon; it was held, that although such assignee might receive the same as attorney of the mortgagor, he could not retain it against the mortgagor, to whom he was liable therefor in an action of assumpsit.[2] The determination of this case, it appeared to the court, depended on a few plain principles of law. The court, in giving judgment, say, — "It is quite clear, that both the mortgage and the policy were collateral securities for the debt, first to Bacon, and afterwards to Brooks. The plaintiff was debtor to Brooks, on his note; this was the principal; the mortgage and policy were collateral securities to him from the plaintiff, through the assignment of Bacon. Suppose such collateral securities consist in goods, or negotiable notes; they are held

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[1] Mix *v.* Hotchkiss, 14 Conn. R. 32. So of the payment of taxes upon premises mortgaged. Ibid.

[2] Felton *v.* Brooks, 4 Cush. (Mass.) R. 203.

in trust, first, to apply any fruits or proceeds of them towards the payment of the debt; and secondly, if the debt is paid in full from other funds, to restore the property, or any fruits or proceeds thereof which may have been received, to the pledgor. In the present case Brooks received the whole of his mortgage debt of Rice, from a fund provided by the plaintiff, and the rights of the plaintiff were the same as if he had paid the whole of the mortgage debt of the plaintiff in money. The conclusion seems inevitable, that the money received by Brooks on the policy, as a return of the premium, was received by him to the use of the plaintiff; and not having applied it, or had occasion to apply it, to the payment of the plaintiff's debt, he is bound in good conscience to pay it to the plaintiff; and the law implies a promise to do so; and this is a sufficient privity in law."[1]

§ 446. On the formation of the Mohawk Insurance Company of New York, the directors resolved to reserve a majority of the stock for themselves, and each director subscribed for 1042 shares, and gave a *promissory note* for the amount. One of the directors gave his note for $20,840 for that number of shares. The company becoming embarrassed, that director induced the president, in consideration of $6,000, to stand in his place for the shares; and this was done without any sanction of the company. The president gave up from the company's effects to the director his note for $20,840, and submitted his own, and had the 1,042 shares placed in his (the president's) name, who was at the time insolvent. The transaction was held to be illegal, it being a fraud on the creditors of the company, and that the director should make good the amount of his note for $20,840.[2]

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[1] See Eaton *v.* Whitney, 3 Pick. (Mass.) R. 484; and Abbott *v.* Hampden Mutual Fire Ins. Co. 17 Shep. (Me.) R. 414.

[2] Nathan (Receiver) *v.* Mohawk Ins. Co. 3 Edw. (N. Y.) Ch. R. 215.

§ 447. Where a testator died, leaving personal property insured against loss by fire, and a creditor recovered a judgment against the executors, and levied his execution on the property in their hands, which property was afterwards destroyed by fire, it was held, in a bill in equity filed against the executors and the insurers, that the attaching creditor was entitled to priority of payment out of the insurance money, over a judgment in favor of other creditors, subsequently recovered against the executors.[1]

§ 448. A testator having insured his dwelling-house against loss by fire, by a covenant of assurance to himself, his heirs, and assigns, devises the same tenement to his wife for life, remainder to his two daughters in fee. During the life of the wife, the house is burnt down, and she receives the insurance money. Without the concurrence of the devisees in remainder, she expends the insurance money in the building of a new house on the premises; and then dies, leaving the new house standing, which devolves to the devisees in remainder, who are then both *femes covert*, and they and their husbands survive the tenant for life. It was held, that neither the covenant of insurance, though to the assured, his heirs, and assigns, nor the testator's will, worked any special destination of the insurance money to the purpose of reinstating the premises; that the tenant for life had a right to receive the insurance money; but when received it was mere personal estate to which she had a right to the use for life, and her daughters to the remainder, and, upon the marriage of the daughters, the marital rights of their husbands attached to it, as to any other personalty to which their wives were entitled in remainder; that the tenant for life had no right to convert the insurance money into real estate, by applying it to the building of a new house, without the consent of the remainder-men; and

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[1] Mapes *v.* Coffin, 5 Paige, (N. Y.) Ch. R. 296; and see Mickles *v.* City Bank, 11 Ibid. 118

that, therefore, at the death of the tenant for life, the husbands of the devisees in remainder had a right to call for the whole insurance money, without any deduction for the value of the new house put on the premises by the tenant for life, and left standing at her death.[1]

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[1] Haxall's Ex'rs *v.* Shippen, 10 Leigh, (Va.) R. 536.

CHAPTER XXIII.

AGENCY.

§ 449. A factor, or, as he is most commonly called, a commission merchant, is an agent to whom goods are consigned or delivered for sale by or for a merchant or other person residing abroad, or at a distance from the place of sale, and who, in return for his trouble, receives a compensation, commonly called *factorage* or *commission*.[1] The term "broker" has been variously defined. Chief Baron Comyn[2] describes brokers as "persons employed among merchants to make contracts between them, and to fix the exchange for payment of wares sold or bought." In Wilkes *v.* Elliss,[3] a distinction was taken between a person employed to make public bargains, and one whose business it was to make private bargains only; and it was stated in the argument of the defendant in that case, on the authority of Cowel's Interpreter, that the latter was the true definition of a broker. This distinction was taken for the purpose of showing that a broker was essentially different from an auctioneer, whose business it was, among other things, to make contracts of sale publicly. The following definition, by Story, is perhaps more strictly correct, that a broker is an agent employed to make contracts in matters of trade, commerce, or navigation, for a commission commonly called

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[1] Baring *v.* Corrie, 2 B. & Ald. R. 143; Russel on Factors and Brokers, 2, 3.

[2] Com. Dig. *Merchant*, C.

[3] Wilkes *v.* Elliss, 2 H. Bl. R. 555.

"brokerage."[1] His character differs from that of a factor or commission merchant, in the following particulars: A factor may buy and sell either in his own name or in that of his principal; a broker, on the contrary, is not intrusted with the possession of what he is employed to sell, nor is he empowered to obtain possession of what he is employed to purchase; but he acts merely as a middle man, or negotiator between the parties.[2] Indeed, a broker is very properly defined by Domat[3] as being a person empowered, not to treat, but to explain the intentions of both parties; and so to negotiate as to put those who employ him in a condition to treat together personally.

§ 450. In those cases, therefore, in which a broker is intrusted with Policies of Insurance, indorsed in blank, he comes rather a factor than a broker; and where the two characters are thus combined, a distinction must be made between the acts of the agent in the one and in the other, as the same rules would not always apply to each. A broker employed to sell or to purchase, has no authority, under his general commission, to contract in his own name, but with respect to an Insurance Broker the rule is different, he having in all cases the power to effect a policy in his own name on behalf of his principal. Indeed it is not requisite that the broker who effects the policy should even describe himself as "an agent."[4]

§ 451. It is, and has been ever since the judgment of Lord Chief Justice Holt, in the case of Coggs *v.* Bernard,[5] a general principle of the law of agency, that every person who is intrusted and undertakes to do business for another, even

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1 Story on Agency, § 28.

2 Baring *v.* Corrie, *ub. sup.*

3 Domat, B. I., tit. 17, s. 1.

4 Baring *v.* Corrie, *ub. sup.*

5 Coggs *v.* Bernard, 2 Ld. Raym. R. 909; De Vignier *v.* Swanson, 1 Bos. & Pull. R. 316, n. *b.*

though he is to be paid *nothing* for his trouble, is yet, by the mere fact of such trust and undertaking, bound so to conduct himself in the business he undertakes as not to be guilty of *gross negligence;* and this applies to insurance. If such unpaid agent be an unprofessional person, or the business he undertakes be unconnected with his general trade or calling, this is all he is bound to; but if his situation or profession is such as to imply skill, and the business he undertakes is directly connected with the exercise of his profession, then, although his undertaking be gratuitous, the failure to exert such skill will be imputable to him as gross negligence.[1]

§ 451. But it is not our intention to treat at large of the principles of the Law of Agency, but only to point out the mode in which they have been applied in the Law of Insurance. Accordingly, we shall proceed to treat of agency as follows: First, AGENTS OF THE UNDERWRITERS; Secondly, AGENTS OF THE ASSURED; and, Thirdly, WHEN A PERSON IS AN AGENT FOR BOTH PARTIES.

§ 452. As has before been stated,[2] the insurance companies in this country are constituted under a charter of incorporation, and the business of incorporated companies is necessarily conducted altogether by agents, and it is incumbent on every such company to exercise care that the agents whom they employ know what their powers and duties are, and that they do not, as a part of their system of business, transcend those powers.[3] *Branch offices* in a different State from the one in which an insurance association exists as an incorporated body, have been found important auxiliaries in extending the operations of the association, and eminently conducive to the

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[1] 2 Duer, 212, § 20; 1 Arn. 150; 2 Kent, Comm. (5th ed.) 570; Story, Bailm. § 12, 13, 14, 15.

[2] *Ante*, § 8, 9.

[3] Conover *v.* Mutual Ins. Co. 1 Comst. (N. Y.) R. 290.

objects in view; and it is the duty of such representatives to point out the advantages of the principal institution.

§ 453. A foreign, as well as a domestic agent, is bound to know the law, and to act accordingly, for the benefit of his employers, and with skill and diligence also in the business of his principal.[1] For a false representation by an agent as to the affairs of the company, whereby a person is induced to effect insurance, an action on the case will lie against the company, although no pecuniary damage has been sustained beyond the payment of the premiums. If an agent of the company answers the inquiries of an applicant for insurance agreeably to the fact, the insurance may not have been effected.[2]

§ 454. The essential question in Perkins *v.* Washington Insurance Company, in the New York Court of Chancery, was, whether one R. was authorized to bind, and did bind the company to insure the goods of the plaintiff at the rate and upon the terms specified in the receipt which he gave to the plaintiff. R. was the *surveyor* appointed by the company, at Savannah, Georgia, to survey and return a description of the property offered for insurance, and to state the terms, and probable rates of insurance to applicants, and to receive from those who were willing to pay the premiums which he might name, and to transmit the same to the company, who reserved to themselves the right of deliberating and deciding on the applications, and to accept or reject them, in their discretion; and their printed proposals stated that no insurance would be considered as made, or binding, until the premium was paid, &c. It was held that R. was not the general agent of the

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[1] Livermore, Agents, 553; Park *v.* Hammond, 4 Campb. R. 344, and 6 Taunt. R. 495.

[2] Pontifex *v.* Bignold, 3 Man. & Grang. R. 63; and see Shrewsbury *v.* Blount, 2 Ib. 475.

company for effecting insurance, nor were they bound by his agreement for that purpose, or his receipt of the premium of insurance, so as to make them responsible for a loss happening before the premium was transmitted to them, and before they knew of the application; and, of course, before they had considered of and accepted the proposal, or executed a policy of insurance. Chancellor KENT, in giving his opinion, said, — "If no loss had intervened, and the defendants, upon information of the survey and rates of premium, had, in their discretion, determined that the risk was not acceptable, I apprehend they would have been deemed in the lawful exercise of a right of deliberation, and that the risk would not and could not have been enforced against them, contrary to their will. The circumstance of a loss occurring before they had time to deliberate, cannot, in reason and justice, impair their rights, and make that act binding which otherwise would not have been deemed so."[1] But notwithstanding this reasoning of the Chancellor, his judgment was reversed unanimously by the Court of Errors.[2]

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[1] Perkins *v.* Washington Ins. Co. 6 Johns. (N. Y.) Ch. R. 485.

[2] 4 Cowen, R. 645. Judge Woodworth, in giving his opinion, said, (in relation to the proviso, *that the company shall be otherwise satisfied with the risk*) — "The question upon this should be considered in the same manner as if application had been made for the policy before any loss sustained. What reasons could have been assigned for dissatisfaction with the risk? If any existed, it was the duty of the respondents to point them out. Not having done so, it is not uncharitable to suppose that they declined acting as in ordinary cases, in consequence of the loss, erroneously supposing that a literal adherence to the words of the instructions would shield them against the appellant's claim to compensation. It is not unnatural, in controversies between individuals, for them, however upright, to seize on every plank that may possibly lead to safety. Hence it comes that no man is a proper judge in his own cause; and that courts are established to measure out equal and exact justice to contending parties.

"The only remaining inquiry is, whether the agreement to insure, between the appellant and Russell, the agent, was within the instructions given by the respondents, and agreeable to their rules and regulations. The

§ 455. In general, the rights of the parties to a contract, as distinguished from their remedies, are to be determined by the law of the place where the contract is to be performed; but it is an exception to this rule where the contract is declared void by the law of the State in which it was made, and yet would be valid in the place where it is to be performed. A mutual fire insurance company in New York had an agent residing in the State of Ohio, who was authorized to receive applications for insurance. This agent received, from a party residing in Ohio, an application, together with the premium note of the applicant, and transmitted them to the office of the company in the State of New York, where they were received, passed upon, and approved, and where a policy was executed, and thence transmitted to the applicant by mail. The agent had no authority to make insurances; the extent of his authority being "to take surveys and receive applications for insur-

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insurance was at 2½ per cent. premium, on dry goods and groceries. It does not appear whether the storehouse which contained the goods was included in the first, second, or third class of hazards. Supposing it to have been the last, the rate of insurance on such buildings, not having goods hazardous therein, is stated at from 175 to 200 cents on the 100 dollars. Goods hazardous, which includes groceries, are charged with 12½ cents in addition to this premium. The rate, then, paid by the appellant, was equal to the highest sum claimed by the respondents in their proposals for insurance. I apprehend, therefore, that there is no well founded objection to the rate of insurance. This is evident from the acts of the respondents in uniformly accepting former risks, upon contracts of insurance made on the same, or not more favorable terms. The only risk rejected was not on the ground that the premium was too small, but that the application was for six months insurance, and the premium paid for that time only; whereas an insurance for six months is always chargeable with three quarters of a year. If, then, we look at the instructions given, the proposals issued containing the rates of insurance, and the acts of the respondents in reference to similar cases, the conclusion seems to be irresistible, that the risk and rate of premium were entirely satisfactory. The premium was also tendered in New York and refused, which is a compliance with the first part of the proviso. This, in my view, removes every obstacle in the appellant's way." See Thayer *v.* Middlesex Ins. Co. 10 Pick. (Mass.) R. 326.

ance." In an action in the State of New York to recover the premium note, it was held that the contract was made in that State, at the office of the company, and not in the State of Ohio; and therefore, that the contract was not within the prohibition of the statute of Ohio, declaring that "no policy of insurance shall be signed, issued, or delivered" in that State, by any company not chartered by the laws thereof, except by an agent of such company, who should first have obtained a license in the manner prescribed by the act.[1]

§ 456. A tax laid upon the agents of foreign insurance corporations from other States, doing business within a particular State, is not unconstitutional. If the legislature is authorized to prohibit the establishment of a foreign agency for the prosecution of any certain sort of business, which it is, it may admit upon terms what it may prohibit altogether.[2]

§ 457. Agents of *incorporated* insurance companies are either specially designated by the act of incorporation, or are appointed and authorized by the corporate body in pursuance of it; and when the act prescribes the particular mode in which its contracts shall be made, that mode must in general be pursued. Hence, where an act incorporating an insurance company provided that all policies, and other instruments, made and signed by the president, or any other officer of the company, should be good and effectual to bind the company, it was held that a contract to cancel a policy must be signed by the president, or other officer, in order to bind the corporation.[3] But though the charter of an insurance company requires that all policies shall be signed by the president, yet it is not necessary that

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[1] Hyde *v.* Goodnow, 3 Comst. (N. Y.) R. 265.

[2] Tatem *v.* Wright, 3 Zabrisk. (N. J.) Sup. Ct. R. 429; and see Rungan *v.* Costar, 14 Peters, (U. S.) R. 129; Louisville Railroad Co. *v.* Letson, 2 How. (U. S.) R. 297.

[3] Head *v.* Providence Ins. Co. 2 Cranch, (U. S.) R. 127; S. P. 2 Johns. (N. Y.) R. 109; 7 Cowen, (N. Y.) R. 462.

the assent of the company to an assignment of a policy should be signed by the president in order to bind the company. The signature of the secretary to such assignment is *primâ facie* evidence of an agreement by the company; and the company, by accepting the assignee's guaranty of the premium note, adopts the act of the secretary, assenting in their behalf to the assignment.[1]

§ 458. Where a policy of insurance prohibited an assignment of the interest of the assured unless by consent of the company, manifested in writing, and the secretary, on an application to him at the office of the company, indorsed upon the policy, and subscribed a consent to an assignment; it was held, that his authority to do so, in the absence of evidence to the contrary, should be presumed, as although he had no written authority, he had often given consent in other cases. "Besides," said the court, "it was enough that the secretary was principal officer or agent of the company, and that he gave the consent on application for that purpose, at the place where the company transacted its business." [2]

§ 459. It would seem that the acts and contracts of agents do not derive their validity from professing, on the face of them, to have been done in the exercise of their agency. In the diversified exercise of the duties of a general agent, the liability of the principal depends on the facts, that the act was done in the exercise and within the limits of the powers delegated, and especially that it was the intent of the parties that the principal, and not the agent, should be bound; and in ascertaining these facts parol testimony is admissible. The

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[1] New England Marine Ins. Co. *v.* De Wolf, 8 Pick. (Mass.) R. 56. And see Angell and Ames on Corp. § 253, 276, *et seq.* 291, (Mr. Ames's Chap.)

[2] Conover Mutual Ins. Co. 3 Denio, (N. Y.) R. 254. See also Dawes *v.* North River Ins. Co. 7 Cowen, (N. Y.) R. 462, and 2 Phill. on Ins. p. 540, sec. 1872.

question in these cases seems to be, as *to whom* the credit is given? Where, however, the president of an insurance company, in transacting the business of the company, gave a note in which he described himself as president of the company, the note was considered the note of the president, and not of the company, the addition to his name being regarded as *descriptio personæ*.[1] It would be difficult to reconcile this decision with authority.[2]

§ 460. *Secondly*, AGENTS OF THE ASSURED. There can be no doubt, as we have seen, that factors and consignees may insure to the extent of their interest, and on their own account, goods delivered to them for sale;[3] but the question has been considerably discussed, whether they have an implied authority as consignees or commission merchants to insure for their principal, *virtute officii*.[4] It may now be considered to be the established doctrine, that they may insure not only for themselves, but for their employers; though they are not under any positive obligation to insure, unless they are so instructed. They may expressly promise to insure, or the usage of trade, or the accustomed mode of dealing between them and their principals, may imply an obligation to insure. The course of dealing between them may have been such, that the one has been used to send orders for insurance, and the other to comply with such orders; so that the former has a right to expect that his orders for insurance will still be observed, unless in the event of notice to discontinue.[5]

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1 Barker *v.* Mechanics' Ins. Co. 3 Wend. (N. Y.) R. 98.

2 See the numerous authorities cited in Angell and Ames on Corp. (Mr. Ames's Chap.) § 294, 4th ed.

3 See *ante*, § 73, *et seq.*

4 Story on Agency, § 111; Livermore on Agency, ch. 8, § 1, p. 325; Paley on Agency, by Lloyd, 18–20, 107, 108.

5 Story on Agency, § 190, citing Ralston *v.* Burclay, Mill. (Louis.) R. 653; and Ib. 583; De Forest *v.* Fulton Ins. Co. 1 Hall, (N. Y.) R. 84.

§ 461. A broker, who is instructed to subscribe a policy, may not only do so in his own name, but he may likewise adjust it. In an action on a policy of marine insurance, the subscription of the policy by the defendant's agent was admitted, and a witness proved the signature of the same to an adjustment on the policy, as for a total loss. By Lord ELLENBOROUGH, — "If an agent has authority to subscribe a policy, he may also adjust it; and here, as you have admitted the agent's subscription to the policy, and that he was authorized to subscribe it, you are bound to admit that he had authority to sign the adjustment."[1]

§ 462. An insurance broker is also empowered by his general authority to receive payment of any loss which may occur on a policy which he has effected, provided the instrument remain in his hands;[2] and in this, as in other cases, the possession by the broker of the principal authority will be held to give him all those medium powers which are requisite in order to enable him to execute the same. If, therefore, it appear that the broker has been in the habit of settling losses for his principal, which the latter has afterwards paid, this will be considered sufficient evidence of an authority in him to refer a dispute concerning any such loss to arbitration.[3] But a broker has no general right to pay losses for the underwriter by whom he is employed.[4]

§ 463. His duty is to be particular in ascertaining whether the underwriters are in good credit at the time of effecting the insurance; otherwise he must bear the loss occasioned by their insolvency. But if the underwriters are in good credit

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[1] Richardson *v.* Anderson, 1 Campb. R. note (*a*); and see Chesapeake Ins. Co. *v.* Stark, 6 Cranch, (U. S.) R. 268, 272.

[2] Shee *v.* Clarkson, 12 East, R. 507, 511; Todd *v.* Reid, 4 B. & Ald. R. 310.

[3] Goodson *v.* Brooke, 4 Campb. R. 163.

[4] Bell *v.* Auldjo, 4 Doug. R. 48; Scott *v.* Irving, 1 B. & Adol. R. 605.

at the time, their subsequent insolvency will not make the agent responsible.[1]

§ 464. When an insurance broker acts under a commission *del credere* from the assured, he becomes immediately liable to his employer, upon a loss happening, for the amount of the loss subscribed. But this will not be the case where he does not guarantee the solvency of the underwriters. If a policy remain in his hands, upon a loss happening, he is bound to use due diligence to obtain payment from the underwriters, and will be liable to his employer for omitting it. And if he actually pay the amount to the assured, relying upon his chance of collecting it from the underwriters, he will not afterwards be allowed to recover it back, upon the ground that they were insolvent at the time.[2]

§ 465. There was a transaction between two companies, in which the two companies were so far in opposition to each other, that the Eagle Company were desirous of insuring a particular life in the Economic, and the Economic Company were desirous to obtain information with respect to that life, and there was a meeting between an officer of the Economic, with an officer of the Eagle; and a communication was made which was the result of that inquiry. A bill was filed by the insurers on the life against the assured, to which the solicitor of the assured was a party as defendant, and the bill stated that on a particular day an agent of the company, with whom the assured wished to effect an insurance, came to the office of the assured, and told their agent that the life was bad, handing to such agent at the same time an unfavorable medical report upon the life. The defendant (the solicitor of the insured) was present at this interview, but in his answer to

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[1] Story on Agency, § 187, 191.

[2] Edgar *v.* Bumstead, 1 Camp. R. 411, n.; Jameson *v.* Swainstone, 2 Campb. R. 546, n.; Le Fevre *v.* Lloyd, 5 Taunt. R. 749.

the bill refused to state what passed, because he was then the solicitor and attorney, and was present as the solicitor and attorney, of the assured, and acquired his information, touching the matters which he refused to answer, solely from the fact of his being present at the time, in the capacity of solicitor and attorney, and professional and confidential adviser of the assured. It was held that this answer was insufficient.[1]

§ 466. A, a manufacturer, contracts with B, C, and D, who are partners, occupying the property of B, for the drying of his wool in a room in the mill. B, C, and D effect an insurance on the mill, covering wool in the room. D retires from the partnership, after which C and D have no interest in the room. B and C effect another insurance, also covering goods in the room. A dissolution of partnership takes place between B and C, which is not communicated to A. C afterwards effects a similar insurance in his own name, and A's wool being damaged by fire, the insurance office pays the proceeds of the damaged wool to A, and the amount of loss on the wool, to the extent of the sum insured thereon, to C. Similar losses had been paid by the partnership to A, under the former policy. It was held, that, as it was not shown that B had authorized the effecting of the then policy, or that the partnership was bound to insure, an action for money had and received could not be maintained by A against B and C *jointly*.[2]

§ 467. *Thirdly*, AN AGENT FOR BOTH PARTIES. It has been asserted of a broker that he is for some purposes treated as the agent of both parties, though primarily he is deemed merely the agent of the party by whom he was first employed.

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[1] Desborough *v.* Rawlins, 3 Mylne & Craig, Ch. R. 515. This case may be referred for the principles upon which some communications are held to be privileged from disclosure.

[2] Armitage *v.* Winterbottom, 1 Man. & Grang. R. 130.

When the bargain is definitively settled, as to its terms, between the principals, he then becomes the agent of the other party; as where the same broker is the agent of the assured for effecting the policy, and of the underwriter for delivering it to the assured and receiving the premium.[1] But it would be a fraud in a broker to act for both parties, to conceal the fact of his agency for one, from the other, in a case where he is intrusted by both with a discretion, and where his judgment is relied on.[2]

§ 468. Where, by the conditions annexed to the policy, it is provided that "in all cases the assured will be bound by the application, for the purpose of taking which the surveyor will be deemed the agent of the applicant, as well as of the company," the surveyor is the agent of the applicant, and the applicant will be affected by any omission of such agent in describing the property insured.[3]

§ 469. On the arrival of damaged goods from a foreign port, the underwriters designated an auctioneer to sell them, and requested the assured to prepare them for sale, and paid him therefor. The assured sent the goods to the auctioneer, they were sold as for account of the underwriters, and the auctioneer failed, without paying over the proceeds to either party. The auctioneer, the court held, was the joint agent of the underwriters and the assured, and the former were not responsible to the latter for the loss by the failure.[4]

§ 470. Although the by-laws of an insurance company make the person taking a survey in its behalf the agent of the *applicant*, still he is the agent of the company also, and it is

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[1] Acey *v.* Fernie, 7 M. & Welsb. R. 151.

[2] Story on Agency, § 31, and authorities by him cited.

[3] Sexton *v.* Montgomery County Mutual Ins. Co. 9 Barb. (N. Y.) Sup. Ct. R. 191.

[4] Jellinghaus *v.* New York Ins. Co. 4 Sand. (N. Y.) Sup. Ct. R. 18.

bound by his acts. He is in the employment of the company, soliciting risks, and making contracts for the company with every body who might wish to insure; and he also makes out the application, and prepares the necessary papers to effect insurances, and hence the court were of opinion that "it would be little less than legalized robbery to allow these insurance companies to escape from liability upon the merest technicality possible, and that, too, when created by its own by-laws."[1]

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[1] Masters *v.* Madison County Mutual Ins. Co. 11 Barb. (N. Y.) Sup. Ct. R. 634; and see Sexton *v.* Montgomery County Mutual Ins. Co. 9 Ibid. 191.

APPENDIX.

APPENDIX.

FROM ELLIS ON THE LAW OF FIRE AND LIFE INSURANCE.

No. I.

Average Clause in Policy of Insurance against Fire.

PROVIDED always and it is hereby declared, that in case the property insured by this policy in all the buildings, places, or limits above mentioned, shall at the breaking out of any fire, or fires, be collectively of greater value than the sum insured thereon, the said company shall pay and make good to the insured such a proportion only of the loss or damage sustained as the amount insured shall bear to the whole property aforesaid at the time when such fire or fires shall first happen. But it is at the same time declared that if the said insured shall, at the time of any fire, be insured in this or any other office, on any specific parcel of goods, or on goods in any specified building or buildings, place or places, included in the terms of this insurance, this policy shall not extend to cover the same, except only as far as relates to any excess of value beyond the amount of such specified insurance or insurances, which excess is hereby declared to be under the protection of this policy, and subject to average as aforesaid.

No. II.

Form of Policy of Insurance against Fire by the Corporation of the Royal Exchange Assurance of Houses and Goods from Fire.

THIS present instrument or policy of assurance, witnesseth that

whereas A. B. hath agreed to pay into the treasury of the Corporation of the Royal Exchange, London, for the assurance of from loss or damage by fire. Know all Men by these presents, That the capital stock, estate, and securities of the said corporation shall be subject and liable to pay, make good, and satisfy unto the said assured, his heirs, executors, or administrators, any loss or damage which shall or may happen by fire to the said goods and aforesaid, (except such goods as hemp, flax, tallow, pitch, tar, turpentine, glass, china, and earthenware, writings, books of accounts, notes, bills, bonds, tallies, ready money, jewels, pictures, gunpowder, hay, straw, and corn unthrashed,) within the space of twelve calendar months from the day of the date of this instrument or policy of assurance, not exceeding the sum of and shall so continue, remain, and be subject and liable as aforesaid, from year to year, to be computed from the day of in every year, for so long time as the said assured shall well and truly pay or cause to be paid, the sum of into the treasury of the said corporation, on or before the day of which shall be in each succeeding year, and the said corporation shall agree thereto by accepting and receiving the same; which said loss or damage shall be paid in money immediately after the same shall be settled and adjusted; or otherwise if the said loss or damage shall not be adjusted, settled, and paid within sixty days after, notice thereof shall be given to the said corporation by the said assured, that then the said corporation, their officers, workmen, or assigns, shall, at the charge of the said corporation, at the end and expiration of the said sixty days, provide and supply the said assured with the like quantity of goods of the same sort and kind, and of equal value and goodness, with those burnt or damnified by fire. Provided always, nevertheless, and it is hereby declared to be the true intent and meaning of this deed or policy, that the said stock, estate, and securities of the said corporation shall not be subject or liable to pay or make good to the assured any loss or damage by fire which shall happen by any invasion, foreign enemy, or any military or usurped power whatsoever. Provided, also, that this deed or policy shall not take place or be binding to the said corporation until the premium for one year is paid, or in case the said assured shall hereafter make any other assurance upon the goods aforesaid, unless the same shall be allowed of and specified upon the back of this policy. Or if the said A. B. at the time when any such fire shall

happen, shall be in the possession of, or let to any person who shall use or exercise therein the trade of a sugar-baker, apothecary, chemist, colorman, distiller, bread or biscuit-baker, ship or tallow-chandler, stable keeper, innholder, or maltster, or shall be made use of for the stowing or keeping of hemp, flax, tallow, pitch, tar, or turpentine; but that in all or any of the said cases these presents and every clause, article, and thing herein contained shall cease, determine, and be utterly void, and of none effect, or otherwise shall remain in full force and virtue. In witness whereof the said corporation have caused their common seal to be hereunto affixed the day of in the year of the reign of our sovereign lord by the Grace of God, of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, &c. and in the year of our Lord one thousand eight hundred

N. B. This Policy to be of no force if assigned, unless such assignment be allowed by any entry thereof in the books of the company.

No. III.

Form of Policy of an Insurance against Fire by the Protector Fire Insurance Company.

WHEREAS ha paid the sum of to the directors of the "Protector Fire Insurance Company," and ha also agreed to pay the sum of yearly on the day of during the continuance of this policy, for insuring from loss or damage by fire the property hereby described, not exceeding the sum specified on each article, namely:

Now be it hereby known, that we, whose hands and seals are hereunto subscribed and affixed, being three of the said directors, do covenant and agree with the said that from the day of 182 to and inclusive of the whole of the day of 182 and so long as the said insured shall pay, or cause

to be paid, the sum of at the time above-mentioned, and the directors for the time being shall accept the same, the stock and funds of the said company shall be subject and liable to pay or make good, and shall to the extent only of the said stock or funds pay or make good to the said insured, executors, administrators or assigns, all such loss or damage as shall happen by fire, (except loss or damage by fire happening by any invasion, foreign enemy, civil commotion or riot, or any military or usurped power whatever,) to the property above-mentioned, amounting in the whole to no more than the sum of according to the conditions indorsed on this policy.

In witness wheroof we have hereunto set our hands and seals this day of in the year of our Lord one thousand eight hundred and twenty

Signed, sealed, and delivered
in the presence of G. H. A. B.
C. D.
Examined, I. K. E. F.
Entered, L. M.

Conditions indorsed on which this Company make insurances from Loss or Damage by Fire.

I. Every person desirous of effecting an insurance must state his name, place of abode, and occupation; he must describe the construction of the buildings to be insured, where situate, and in whose occupation; of what materials the same are respectively composed, and whether occupied as dwelling-houses or otherwise; also the nature of the goods, or other property, on which such insurance may be proposed, and the constructions of the buildings containing such property.

II. Every insurance attended with particular circumstances of risk, arising from the situation or construction of the premises, or the nature of the trade carried on, or the goods therein, is to be specially mentioned in the order given for the policy, so that the risk may be fairly understood; if not so expressed, or if any misrepresentation be given, so that the insurance be effected upon a lower premium than ought to be paid; or if buildings or goods be described in the

policy otherwise than they really are; or if, after an insurance shall have been effected, the risk shall be increased by the erection or alteration of any stove; the carrying on any hazardous trade, operation, or process; the deposit of any hazardous goods or hazardous communication; the insured will not, except under the consent of the directors, and on the terms they may impose, be entitled to any benefit under his policy.

III. No insurance proposed to this company is to be considered in force until the premium or duty, or a deposit on account thereof, be actually paid. No receipts are to be taken for any premiums of insurance, or deposits, except such as are printed and issued from the office, and witnessed by one of the clerks or agents of the office.

IV. The interest of any deceased person in any policy of this company may be continued to the executor or administrator respectively, or to the person otherwise entitled to the property insured, provided the person so entitled shall procure his or her interest to be indorsed on the policy at the office of the company; and if goods insured be removed to any other situation than where the same were deposited at the time of effecting the insurance, such removal must be allowed by indorsement on the policy.

V. Where loss of rent is intended to be covered by the sum insured, the amount must be specified on the policy.

VI. Persons insuring property at this office must give notice of any other insurance made elsewhere on the same property on their behalf, and cause a minute or memorandum of such other insurance to be indorsed on their policies; in which case this company shall only be liable to the payment of a ratable proportion of any loss or damage which may be sustained; and unless such notice be given, the insured will not be entitled to any benefit under this policy.

VII. All persons insured by this company, sustaining any loss or damage by fire, are forthwith to give notice to the company at their head office in London, and, as soon as possible, to deliver in as particular an account of their loss or damage as the nature of the case will admit, and make proof of the same by affidavit or affirmation before a justice of the peace, and produce such other evidence as the directors of this company may reasonably require; and until such affidavit or affirmation, account and evidence are produced, the amount of such loss, or any part thereof, shall not be payable or recoverable; and if there appear fraud in the claim made for such

loss, or false swearing or affirming in support thereof, the claimant shall forfeit all benefit under such policy, except such as the directors may think fit to allow.

VIII. Persons insured by this company, and who may suffer loss, will receive their idemnity without deduction or discount; but in every loss the company will reserve to itself the right of reinstatement within a reasonable time, in preference to the payment of claims, if it shall judge that course to be most expedient.

IX. It is a principle of the company, that no individual proprietor is to be in any case liable to contribute to the stock and funds of the company more than his or her unpaid part of the capital of the company; and after a proprietor has transferred any share with the approval of the directors, the transferee, and not the former proprietor, is to be answerable for the unpaid capital on that share.

X. If any difference shall arise with respect to the amount of any claim for loss or damage by fire, and no fraud suspected, such difference shall, according to the provisions of the deed of settlement for the purpose, be submitted to arbitrators indifferently chosen, whose award shall be conclusive.

No. IV.

Indorsement of Policy of Insurance against Fire on Removal of Property.

THE property insured by this policy (or such of the property as is insured) having been removed to the insured's dwelling-house, brick, timber, and tiled, situate in in the county of the same shall remain insured in such house, and not as heretofore.

The same sums insured, and premiums as before.

Entered in the office books this day of .

No. V.

Transfer of Policy on Conveyance of Interest by Purchase or Gift.

I, A. B., do hereby assign all my right and interest in this policy to C. D. of in the county of .

Witness my hand this day of .

Signed in the presence of and entered in the office books this day.

No. VI.

Memorandum to be indorsed on a Policy in case of an Addition.

MEMORANDUM. It is hereby declared, that there is a stove erected in one of the sheds adjoining the herein described; the same is hereby allowed without prejudice to this insurance.

Entered day of .

No. VII.

Form of a Policy of Insurance upon a Life for the Life of the Insured, by the Society for Equitable Assurances upon Lives.

THIS present instrument or policy of insurance witnesseth, that whereas A. B. of in the county of hath entered into and become a member of the Society for Equitable Assurances on Lives and Survivorships, according to a certain deed of settlement, bearing date the seventh day of September, which was in the year of our Lord one thousand seven hundred and sixty-two, and inrolled in his Majesty's Court of King's Bench at Westminster, and whereas

the said society, relying upon the truth of a certain declaration dated this day of made and signed by the said A. B. touching the age, state of health, and other circumstances attending the said A. B. have assured to the said A. B. the sum of pounds, to be paid to his executors, administrators, or assigns, after the decease of the said A. B., whensoever the same shall happen, provided the said assured does not exceed the age of years on this day of and has had the small pox, and is not afflicted with any disorder which tends to the shortening of life, (as in the said declaration is more fully set forth,) at and under the annual sum or premium of .

And whereas the said assured hath executed the covenants usually entered into by members of the said society, and hath paid such premium for one whole year, commencing from the date of these presents: now we, whose names are hereunto subscribed and seals affixed, being two of the trustees of the said society, do for ourselves and our assigns, trustees of the said society, covenant, promise and agree to and with the said assured, and the executors, administrators, and assigns of the said assured, that if the said assured, or the assigns of the said assured, shall yearly and every year, during the term of this assurance, continue to pay to the trustees of the said society, or to any two or more of them, the annual sum or premium aforesaid on or before the day of in every year, and shall observe, perform, and fulfil and keep all and singular the covenants, articles, clauses, provisos, conditions, and agreements, which on the part and behalf of the said assured are and ought to be observed, performed, fulfilled, and kept, according to the true intent and meaning of the said deed of settlement; we, or our assigns, trustees of the said society for the time being, will or shall, within six calendar months after satisfactory proof shall have been made of the death of the said assured, well and truly pay, or cause to be paid, out of the stock or fund of the said society, unto the executors, administrators, or assigns of the said assured, the full sum so hereby assured: provided always, and it is hereby declared to be the true intent and meaning of this policy of assurance, and the same is accepted by the said assured upon these express conditions, that in case the said assured shall die upon the seas, or shall go beyond the limits of Europe, unless license be obtained from the court of directors, or shall die by his own hands or by the hands of justice, or if the age

of the assured does exceed years; or if the said assured be now afflicted with any disorder which tends to the shortening of life, or if the above-mentioned declaration contains any untrue averment, this policy shall be void.

In witness, &c.

No. VIII.

Policy of Insurance on the Life of a Third Person, by the Crown Life Insurance Office.

WHEREAS the person assured by this policy, is desirous and has proposed to effect an assurance with the Crown Life Assurance Company, in the sum of upon the life of for the whole continuance thereof, and has caused to be delivered into the office of the said company a declaration or statement in writing, bearing date the day of signed by whereby it was declared, amongst other things, that the age of the said did not exceed years, that he had had the small pox, that he had had the cow pox, that he had not had the gout, and that he was not affected with fits, convulsions, asthma, insanity, or spitting of blood, or any disorder which tended to the shortening of life, and whereby the said assured agreed that such declaration or statement should be the basis of the contract between himself and the said company. And whereas the said assured has paid to the directors of the said company the sum of as the premium or consideration for the assurance of the said sum of until the day of inclusive; and has also paid the further sum of as the full premium or consideration for the assurance of the said sum of for one whole year, commencing the day of and terminating on the day of inclusive, the receipt whereof is hereby acknowledged.

Now, therefore, this policy witnesseth, that we three directors of the said company, whose names are hereunto subscribed, do hereby agree, that in case the said shall die at any time previous to the said day of or within the term of one year com-

mencing on the day of and terminating on the day of both inclusive; or if the said assured, or his assigns, shall in the event of the said living beyond the said term of one year, pay or cause to be paid to the said company during his life, the like annual premium of on or before the day of in the year and on or before the same day in every subsequent year, the funds and property of the said company applicable by the deed or deeds of settlement of the said company to the payment of moneys assured by life policies, shall, according to the provisions of such deed or deeds, be subject and liable to pay and satisfy to the said assured, his executors, administrators, or assigns, within three calendar months next after proof shall have been given to the satisfaction of the directors of the said company, of the death of the said the full sum of of lawful money, together with such further security, if any, as shall have been assigned to or in respect of this policy, pursuant to the rules and regulations for the time being of the said company, as or by way of bonus or addition to the sum hereby assured.

Provided, nevertheless, that in case any untrue allegation be contained in the declaration or statement so as aforesaid delivered into the office of the said company on behalf of the said assured, or if it should be proved that the referees have knowingly given false testimonials, then this policy of assurance shall be void. Provided, also, that this policy and the assurance hereby effected are and shall be subject and liable to the several conditions, restrictions, and stipulations hereupon indorsed, so far as the same are or shall be applicable, in the same manner as if the same respectively were here repeated and incorporated in the policy. Provided always, nevertheless, that the subscribed capital stock and other the funds and property of the said company, by the deed or deeds of settlement applicable to the payment of moneys assured by life policies, shall, subject to all prior claims and demands, alone be liable to answer and make good all claims and demands in respect of this policy, and that no director or other proprietor of the said company, his executors or administrators, shall by reason of this or any other policy, or of the whole of the policies taken together, which any director has signed or may sign, be in anywise individually subject or liable to any claims or demands beyond the amount of the unpaid part of his share or shares in the said subscribed capital stock, and that no other person shall on any

account whatsoever be in anywise subject or liable to any claims or demands in respect of this policy.

In witness whereof, we, three of the directors of the said company, have hereunto set our hands this day of in the year of our Lord .

A. B.
Examined, G. H. C. D.
E. F.

Entered, I. K.

Conditions indorsed in cases of ordinary Risks.

Policies will not be considered to be in force beyond thirty days after the expiration of the year, unless the premium then due shall have been paid to the company; but should proof be given to the satisfaction of the directors, that the party or parties whose life or lives hath or have been assured continue in good health, the policies may be revived at any period within six months, on the payment of a fine, to be fixed by the board of directors, not exceeding ten shillings per cent. on the sum assured; or at any period within thirteen months, on the payment of such fine as a board of directors may think reasonable.

Policies will become void if the parties whose lives have been assured shall go beyond the limits of Europe, or shall die on the high seas, (except in passing from one part of the United Kingdom of Great Britain to another, and to and from the Islands of Guernsey, Jersey, Alderney, Sark, and Man, and also in time of peace in King's ships, and in steam or other packet or passage vessels to or from British ports, and any foreign ports between the Elbe and Brest, both inclusive,) or being or becoming military or naval men, shall be called into actual service, unless in each case the parties shall avail themselves of the scale of premiums allotted to the specific risk by the company.

Assurances made by persons on their own lives will become void if they die by duelling, by their own hands, or by the hands of justice. But the directors in their discretion may make such allowance in respect of the policies of the deceased as they may deem just and reasonable.

Policies may be assigned by a separate deed, of which forms may be had at the office.

If any person should become desirous of discontinuing an insurance effected at this office for the whole term of life, the company will purchase the interest in such policy at a fair price.

All claimants upon the decease of any person whose life shall have been assured by the company, must, if required, make proof thereof, and give such further information respecting the same as the directors may think reasonable.

Reasonable proof will also be required of the time of birth, unless that fact shall have been previously established, in which case the same will be admitted by indorsement on the policy.

The time for payment of claims accruing by death is within three calendar months after the proof of the death of the party or parties upon whose life or lives the assurance has been effected.

No. IX.

Heads of Indenture of Assignment of a Policy of Insurance on Life as a Security for a Debt.

This Indenture made the day of between A. B. of the one part, and C. D. of the other part, (recites the policy,) and that A. B. had requested C. D. to lend and advance the sum of witnesseth, that in consideration of A. B. hath granted, bargained, sold, assigned, &c. and by these presents doth, &c. all that instrument or policy of insurance, &c. and all sum or sums of money due, owing, or recoverable by virtue of the said policy, and the full benefit and advantage of the same, and of all profits or bonuses, &c. to have, hold, &c. unto the said C. D. &c.

Provided, that if the said A. B. pay, &c. unto the said C. D. on or before the day hereinafter mentioned, the said sum of and all and every sum which shall be then due and owing, together with interest for the same, without deduction, then the said C. D. &c. will at the request of the said A. B. re-assign the said policy free from incumbrances.

Provided, that if default be made in payment of such sum of for the space of next after the day for payment of the same, it shall be lawful for C. D. without consent of A. B. to sell the said policy by public auction or private contract unto any person, &c. who shall be willing to become the purchaser, &c. thereof, for the best price, &c. and on payment to assign the said policy as such purchaser, &c. shall direct or appoint, and to make effectual receipts for the same, and to exonerate the purchaser, &c. from liability to inquire into the necessity of the sale, and from all responsibility as to the application of the produce, and out of the moneys, &c. to satisfy any premiums paid by C. D. &c. for the purpose of keeping on foot the said policy, and all costs, &c. relating to the recovery of the money due or to become due on the said policy, or the said sum of and to apply the residue towards payment of the said sum of and of all other sums which may be due and owing at the time of such sale, and interest thereof, and in case of a surplus to pay the same to A. B.

A. B. constitutes C. D. his attorney, and to give receipts or prosecute actions or suits for recovering payment, and ratifies all acts of C. D.

Covenant by A. B. to pay the said sum of on or before together with interest and all costs.

That A. B. hath done no act to incumber or vacate said policy, hath power to assign, will not revoke any power or authority, covenant for further assurance of the said policy, and that A. B. will during the continuance of this security pay said premiums payable in respect of such policy, and within thirty days after the same become due will produce to C. D. receipts for the same, and will truly observe the terms and conditions of the said policy.

If A. B. shall refuse or neglect to pay the premiums in respect of the said policy, or to do any thing necessary for keeping on foot the same, it shall be lawful for C. D. &c. to pay said premiums, and such other sums, &c. and such premiums and sums shall stand charged upon the said policy, and may be retained out of the moneys to be recovered thereon.

That A. B. will not depart out of England without giving a month's notice to C. D. of A. B.'s intention, in order that C. D. may be enabled to make known the same at the office of the said society, and pay additional premium if necessary.

That A. B. during the continuance of such security will not go beyond the limits of Europe without the consent of C. D. or permit or do any thing whereby such policy may be avoided.

That A. B. will not without consent of C. D. or the order, judgment, or decree of some Court of Law or Equity, release or discharge any part of the said sums.

No. X.

Form of Memorial of Annuity. (53 *Geo.* 3, *c.* 141.)

Date of Instrument.	Nature of Instrument.	Names of Parties.	Names of Witnesses.	Name or Names of Person or Persons by whom Annuity or Rent-charge to be beneficially received.	Person or Persons for whose life or lives, the Annuity or Rent-charge is granted.	Consideration, and how paid.	Amount of Annuity or Rent-charge.
10 Aug. 1813.	Indenture of lease and release.	A. B. of the one part, C. D. of the other part.	E. F. of G. H. of	C. D.	A. B.	£100 paid in money, £500 paid in Notes of the Governor and Company of the Bank of England, or other Notes or Bills of Exchange, as the case may be.	£100 a year.
Same date .	Bond in penalty of £1200.	A. B. to C. D.	E. F.	For securing the same Annuity or Rent-charge.			
Same date .	Warrant of attorney to confess judgment on the same bond.	A. B. to I. K. and L. M. Attorneys of the Court of King's Bench.	E. F. G. H.				

No. XI.

Bond from A. B. to C. D. for securing an Annuity for the Life of A. B.; also to be secured by a Warrant of Attorney and Deed of Grant.

KNOW all men by these presents, That I, A. B. (the obligor,) of &c. am held and firmly bound to C. D. (the obligee) of &c. in the sum of £1600 of good and lawful money of Great Britain, to be paid to the said C. D. or his certain attorney, executors, administrators, or assigns; for which payment to be well and faithfully made I bind myself, my heirs, executors, and administrators, and every of them, firmly by these presents sealed with my seal. Dated this, &c.

WHEREAS the above-bounden A. B. hath agreed with the above-named C. D. for the sale to him the said C. D. of one annuity or yearly sum of £100, to be paid to the said C. D. his executors, administrators, or assigns, during the life of the said A. B. and to be secured as well by the Bond of the said A. B. as also by a Deed of Grant and Warrant of Attorney, at or for the price or sum of £800; and upon the treaty for the said sale it was agreed by the said A. B. and C. D. that the costs and expenses of preparing and perfecting the said several securities for the said annuity, and for enrolling a memorial thereof, should be paid and borne by the said A. B. And whereas the said C. D. hath on the day of the date of the above-written bond or obligation, with his own proper hands, duly paid the sum of £800 in good and valid notes of the Governor and Company of the Bank of England, commonly called Bank Notes, and expressed to be payable respectively to the bearer thereof on demand, unto the said A. B. in full for the purchase of the said annuity or yearly sum of £100, which he the said A. B. doth hereby admit and acknowledge. NOW THE CONDITION of the above-written bond or obligation is such, that if the said A. B. his heirs, executors, or administrators, or some or one of them, do and shall well and truly pay or cause to be paid unto the said C. D. his executors, administrators, or assigns, during the natural life of him the said A. B. one annuity or yearly

sum of £100 of lawful money current in Great Britain, by four even and equal quarterly payments on the day of the day of the day of and the day of in every year, without any deduction or abatement whatsoever, and do and shall make the first payment of the said annuity or yearly sum of £100 on the day of next ensuing the day of the date of the above-written bond or obligation, if he the said A. B. shall then be living; and if the said A. B. shall depart this life before the said day of next, or shall survive the same day of and shall afterwards depart this life on any other day than any one of the said quarterly days of payment, then do and shall pay a proportionate part of the said annuity or yearly sum of £100 to the said C. D. his executors, administrators, or assigns, immediately after the decease of the said A. B. for the time which he the said A. B. shall have lived of the said current quarter of a year. Then the above-written bond or obligation to be void and of no effect, or else to be and remain in full force and virtue.

Signed, sealed, &c.

No. XII.

Grant of an Annuity secured upon Freehold Property during the Life of the Grantor.

This Indenture made, &c. between A. B. (the grantor) of, &c. of the first part, C. D. (the grantee) of, &c. of the second part, and J. R. the trustee of, &c. of the third part. Whereas under or by virtue of certain indentures of lease and release bearing date respectively on or about the and days of 1806, the release being made or expressed to be made between, &c. being the settlement executed previously to the marriage then intended to be and shortly afterwards duly solemnized between the said A. B. and Harriet D. afterwards called H. B. his wife, (and since dead,) the messuages, &c. hereinafter particularly mentioned, with their appurtenances, were conveyed and limited after the determination of cer-

tain uses and estates in the said indenture of release mentioned, which have all since determined, or become incapable of taking effect, to the use of the said A. B. and his assigns, during the term of his natural life, with divers remainders over. And whereas the said A. B. hath contracted and agreed with the said C. D. for the absolute sale to him the said C. D. of one annuity or clear yearly sum of £100, to be paid to the said C. D. his executors, administrators, or assigns, during the life of the said A. B. and to be secured in manner hereinafter mentioned, at or for the price or sum of £800, and upon the treaty for the said sale it was agreed, that the costs of preparing and perfecting the securities for the said annuity, and for enrolling a memorial thereof, should be borne and paid by the said A. B. And whereas in pursuance and performance of the said agreement on the part of the said C. D. he the said C. D. hath this day with his own proper hands duly paid the said sum of £800 in good and valid notes of the Governor and Company of the Bank of England, commonly called Bank Notes, and expressed to be payable respectively to the bearer thereof on demand, unto the said A. B. And whereas in pursuance and part performance of the said agreement on the part of the said A. B. it is intended that the said A. B. shall immediately after the sealing and delivery of these presents, execute a certain bond or obligation in writing in the penal sum of £1600 already prepared and engrossed, and bearing or intended to bear even date with these presents, with a condition thereunder written for making void the same on payment of the said annuity or clear yearly sum of £100, as therein and hereinafter mentioned, and shall likewise execute a certain warrant of attorney, already prepared and engrossed, and bearing or intended to bear even date with these presents, thereby authorizing certain attorneys of his Majesty's Court of King's Bench at Westminster to confess judgment against him the said A. B. in an action of debt on the said bond for the sum of £1600, besides costs of suit; and it is intended that judgment shall and may be forthwith entered up thereupon accordingly. Now this Indenture witnesseth, that in pursuance and further performance of the said recited agreement, and for and in consideration of the sum of £800 of lawful money of Great Britain, that is to say in Bank Notes as aforesaid, to the said A. B. in hand well and truly paid by the said C. D. at or immediately before the sealing and delivery of these presents, the receipt of which said sum of £800, and that the same is in full for

the purchase of the said annuity, he the said A. B. doth hereby admit and acknowledge, and of and from the same and every part thereof doth hereby acquit, release, exonerate, and discharge the said C. D. his executors, administrators, and assigns, and every of them forever, he the said A. B. hath given, granted, bargained, sold, and confirmed, and by these presents doth give, grant, bargain, sell, and confirm unto the said C. D. his executors, administrators, and assigns, one annuity or clear yearly rent or sum of £100 of lawful money of Great Britain, to be charged and chargeable upon and issuing and payable out of all that, (*a*), &c. and out of and upon their and every of their appurtenances, to have, hold, receive, and take the said annuity, or yearly rent, or sum of £100, unto and by the said C. D. his executors, administrators, and assigns, henceforth for and during the term of the natural life of the said A. B. to be computed from the day next before the day of the date of these presents, the said annuity to be paid and payable by four even and equal quarterly payments, on the day of the day of the day of and the day of in every year, without any deduction or abatement out of the same, or any part thereof, for or on account of any present or future taxes, charges, rates, assessments, or impositions, or any other matter, cause, or thing whatsoever. The first payment of the said annuity, or yearly rent, or sum of £100, to be made on the day of next ensuing the day of the date of these presents, if the said A. B. shall then be living; and if the said A. B. shall depart this life before the said day of or shall survive the same day of and shall afterwards depart this life on any other day than any one of the said quarterly days of payment, then a proportionate part of the said annuity, or yearly rent, or sum of £100, to be paid to the said C. D. his executors, administrators, or assigns, immediately after the decease of the said A. B. for the time which he the said A. B. shall have lived of the then current quarter of a year. And the said A. B. for himself, his heirs, executors, and administrators, doth covenant, grant, and agree with and to the said C. D. his executors, administrators, and assigns, by these presents in manner following, (that is to say) that if the said annuity or yearly rent, or sum of £100, or any part thereof, shall be in arrear and unpaid by the space of twenty-

(*a*) The premises to be described.

one days next after any of the said days or times whereon the same ought to be paid as aforesaid, then and in such case as often as the same shall happen it shall and may be lawful for the said C. D. his executors, administrators, or assigns, to enter into and upon all or any of the said messuages, &c. hereinbefore charged with the said annuity, or yearly rent, or sum of £100, and to distrain for the said annuity, or yearly rent, or sum of £100, and for all arrears thereof, and to sell and dispose of the distress and distresses then and there taken, or otherwise to demean therein, according to law, in like manner as in the case of distress taken for rent reserved by lease or common demise, to the end and the intent that he the said C. D. his executors, administrators, or assigns, may be fully paid and satisfied the said annuity, or yearly rent, or sum of £100, and all arrears of the same, and all costs, charges, and expenses occasioned by the non-payment of the same. And also that in case the said annuity, or yearly rent, or sum of £100, or any part thereof, shall at any time or times hereafter be in arrear and unpaid by the space of thirty-one days next after any of the said days or times on which the same ought to be paid as aforesaid, then and in such case and from time to time as often as the same shall happen it shall and may be lawful (although no legal demand shall have been made thereof,) for the said C. D. his executors, administrators, or assigns to enter into or upon and to hold and enjoy all and singular the said messuages, &c. hereinbefore charged with the payment of the said annuity, or yearly rent, or sum of £100, or any part thereof, and to receive and take the rents, issues, and profits thereof to and for his and their own use and benefit until he or they shall therewith and thereby or otherwise be fully paid and satisfied all the arrears of the said annuity or yearly rent, or sum of £100, due at the time of such entry, and which shall afterwards accrue and become due and payable during his and their being in possession of the same premises, together with all such costs, charges, damages, and expenses whatsoever, which he or they shall sustain or be put unto by reason of the non-payment thereof, and such possession when taken to be without impeachment of waste. And the said A. B. for himself, his heirs, executors, and administrators, doth covenant, promise, and agree to and with the said C. D. his executors, administrators, or assigns, by these presents in manner following, that is to say, that he the said A. B. his heirs, executors, or administrators, or some or one of them, shall and will

well and truly pay or cause to be paid unto the said C. D. his executors, administrators, or assigns, for and during the natural life of him the said A. B. the said annuity, or yearly rent, or sum of £100, and also such proportionate part thereof as aforesaid as when the same respectively shall become due and payable as aforesaid, without any deduction or abatement whatsoever, and according to the true intent and meaning of these presents. And that the said A. B. now hath in himself good right, full power, and lawful and absolute authority to grant and confirm the said annuity, or yearly rent, or sum of £100, and to charge the same upon all and singular the said messuages, &c. hereinbefore mentioned in manner aforesaid, and according to the true intent and meaning of these presents. And that all and singular the same messuages, &c. shall during the natural life of the said A. B. and also during such time thereafter as any arrears of the said annuity, or yearly rent, or sum of £100, or any costs or expenses incurred in respect thereof shall remain unpaid, continue and be charged and chargeable with and subject and liable to the distress and distresses entry and entries of the said C. D. his executors, administrators, or assigns, or other the powers and remedies herein contained for the recovery of the same. And that free and clear, and freely and clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by the said A. B. his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all and all manner of former and other grants, charges, and incumbrances whatsoever. And further, that he the said A. B. and all and every persons and person whomsoever having or claiming, or who shall or may at any time or times hereafter have or claim any estate, right, title, or interest, legal or equitable, in, to, or out of the said messuages, &c. hereinbefore charged with the payment of the said annuity, or yearly rent, or sum of £100, shall and will at any time or times hereafter, upon every reasonable request of the said C. D. his executors, administrators, or assigns, but at the proper costs and charges of the said A. B. make, do, and execute, or cause or procure to be made, done, and executed all and every such further and other lawful and reasonable acts, deeds, assurances, matters, and things whatsoever, for the further, better, more perfectly, and absolutely charging the said messuages, &c. with the said annuity or yearly rent, or sum of £100, and such powers and remedies for recovering and enforcing payment thereof

as aforesaid as by the said C. D. his executors, administrators, or assigns, or his or their counsel in the law shall be reasonably advised and required. (*a*) And this indenture also witnesseth, that in pursuance and further performance of the said recited agreement on the part of the said A. B., and in consideration of the said sum of £800 to him paid by the said C. D. as hereinbefore is mentioned, and for the more effectually securing the payment of the said annuity, or yearly rent, or sum of £100 to the said C. D., his executors, administrators, and assigns, and in consideration of 10*s.* of lawful money aforesaid to the said A. B. well and truly paid by the said J. R. at or immediately before the sealing or delivery of these presents, the receipt whereof is hereby acknowledged, he, the said A. B., upon the nomination and appointment of the said C. D. (testified by his signing and sealing these presents) hath granted, bargained, sold, and demised, and by these presents doth grant, bargain, sell, and demise unto the said J. R., his executors, administrators, and assigns, the messuage, &c. and all and singular other the premises hereinbefore charged with the payment of the said annuity, or yearly rent, or sum of £100, or expressed and intended so to be, with their appurtenances; And all the estate, &c. To have and to hold the said messuages, &c. and all and singular other the premises hereinbefore described, with their appurtenances, (subject to and chargeable with the said annuity, or yearly rent, or sum of £100, and the powers and remedies hereinbefore given for securing the payment thereof,) unto the said J. R., his executors, administrators, and assigns, for and during the term of 500 years, to be computed from the day next before the date of these presents, and thenceforth next ensuing and fully to be complete and ended, (if the said A. B. shall so long live,) without impeachment of waste, Upon the trusts nevertheless, and to and for the intents and purposes hereinafter expressed or declared of or concerning the same, that is to say, Upon trust that he, the said J. R., his executors, administrators, or assigns, do and shall permit and suffer the said A. B. and his assigns to receive and take the rents, issues, and profits of the said messuages, &c. hereinbefore demised, or intended so to be, until the said annuity, or yearly rent, or sum of £100, or some part thereof, shall happen to be in arrear and unpaid

(*a*) If the premises consist of buildings, a covenant to insure against fire will be properly inserted here.

by the space of forty days next after any of the said days or times whereon the same ought to be paid as aforesaid; And when and as often as the said annuity, or yearly rent, or sum of £100, or any part thereof, shall be in arrear and unpaid by the space of forty days next after the same shall have become due and payable, do and shall, by and out of the rents and profits of the said messuages, &c., hereinbefore demised, or intended so to be, or by demising, leasing, mortgaging, or selling or disposing of the same premises respectively, or any part thereof, for all or any part of the said term of 500 years, or by bringing any action or suit against the tenants or occupiers of the said premises for the recovering of the rents, issues, and profits thereof, or by all or any of the ways or means aforesaid, or by such other ways or means as to him or them shall seem meet, levy and raise such sum or sums of money as will be sufficient, or as he or they shall think expedient to raise, for paying and satisfying unto the said C. D., his executors, administrators, or assigns, the said annuity, or yearly rent, or sum of £100, or such part thereof as shall be in arrear and unpaid, and all costs, charges, and expenses whatsoever, which they the said C. D. and J. R., or either of them, their or either of their executors, administrators, or assigns, shall or may sustain or be put unto by reason of the non-payment of the said annuity, or yearly rent, or sum of £100, or of any part thereof, or otherwise in the execution of the trusts of the said term of 500 years, and do and shall pay and apply the money so to be levied and raised, or a competent part thereof, in or towards the satisfaction of the said annuity, or yearly rent, or sum of £100, or so much thereof as shall be in arrear and unpaid as aforesaid, and of all costs, charges, and expenses accordingly, and do and shall pay the residue and surplus (if any) of the said money unto the said A. B., his executors, administrators, or assigns, for his or their own use and benefit; And the said A. B. for himself, his heirs, executors, and administrators, doth covenant, promise, and agree to and with the said J. R., his executors, administrators, and assigns, by these presents in manner following, that is to say, that he the said A. B. now hath in himself good right, full power, and absolute authority, to bargain, sell, and demise the said premises, &c., hereinbefore demised, or intended so to be, unto the said J. R., his executors, administrators, or assigns, for and during the said term of 500 years,

determinable as aforesaid,) upon the trusts and in the manner aforesaid, according to the true intent and meaning of these presents; And that from and after default shall be made in payment of the said annuity, or yearly rent, or sum of £100, or any part thereof, contrary to the true interest and meaning of these presents, he the said J. R., his executors, administrators, or assigns, shall and lawfully may peaceably and quietly enter into and upon, and hold, occupy, and enjoy all and singular the said messuages, &c., hereinbefore demised, or intended so to be, and receive and take the rents, issues, and profits thereof, upon the trusts and in manner aforesaid, and according to the true intent and meaning of these presents, without any hinderance, interruption, or disturbance whatsoever, of or by the said A. B., or any other person or persons whomsoever, and that free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise, by him the said A. B., his heirs, executors, or administrators, well and sufficiently protected and kept indemnified of, from, and against all, and all manner of adverse estates, titles, troubles, charges, liens, and encumbrances whatsoever; and further, that he the said A. B., and all and every persons and person whomsoever having or claiming, or who shall or may have or claim any estate, right, title, or interest in, to, or out of the said messuages, &c., hereinbefore demised, or intended so to be, shall and will at any time or times hereafter, upon every reasonable request of the said C. D., his executors, administrators, or assigns, but at the proper costs and charges of the said A. B., make, do, and execute, or cause or procure to be made, done, and executed, all and every such further, and other lawful and reasonable acts, deeds, assurances, matters and things whatsoever, for the more effectually bargaining, selling, demising, and assuring the said messuages, &c., hereinbefore demised, or intended so to be, unto the said J. R., his executors, administrators, and assigns, for the residue and remainder which shall be then to come and unexpired of the said term of 500 years, (determinable as aforesaid,) in manner aforesaid, and according to the true intent and meaning of these presents, as by the said C. D., his executors, administrators, or assigns, or the said J. R., his executors, administrators, or assigns, or their or either of their counsel in the law, shall be reasonably advised or required; And moreover, that he the said A. B. shall and will at any time or times hereafter, (when thereunto requested by the said C. D., his executors. administrators,

or assigns, and as often as there shall be occasion,) appear in person at some life insurance office or offices in the cities of London or Westminster, or before any agent or agents of such office or offices, and also procure and exhibit, or send or cause to be sent to such office or offices, or agent or agents, proper and satisfactory certificates, or other vouchers, of the birth, age, and state of health of him the said A. B., in order that the said C. D., his executors, administrators, or assigns, may insure any sums or sum of money upon the life of him the said A. B., and in case any such assurance shall be effected, and the said A. B. shall at any time thereafter change his usual place of abode, then that he the said A. B. shall forthwith give notice thereof to the said C. D., his executors, administrators, or assigns, specifying the place to which he shall so remove, and shall and will do, or cause to be done, all such other acts, matters, and things as shall be expedient and requisite for effecting and keeping on foot any such assurance or assurances as aforesaid: And if it shall happen that the said A. B. shall leave England, (except to Ireland,) by reason whereof any extra premium shall become payable on such assurance or assurances, then that he the said A. B. shall and will, as often as the same shall happen, pay unto the said C. D., his executors, administrators, or assigns, all such sum or sums of money as shall become due or payable for such extra premium, when and as often as the same shall become due. And this indenture further witnesseth, and it is hereby agreed and declared between and by the said parties to these presents, that the judgment so to be entered up against the said A. B. as aforesaid, is intended to be a further security to the said C. D., his executors, administrators, and assigns, for the said annuity, or yearly rent, or sum of £100, and that no execution or executions shall be issued or taken out upon the said judgment until the said annuity, or yearly rent, or sum of £100, or some part thereof, shall be in arrear by the space of forty days next after the same shall have become due and payable; and that as often as the said annuity, or yearly rent, or sum of £100, or any part thereof, shall be in arrear and unpaid by the space of forty days next after any of the said days or times whereon the same ought to be paid as aforesaid, then and in such case, and as often as the same shall happen, it shall be lawful for the said C. D., his executors, administrators, or assigns, to sue out any execution or executions upon or by virtue of the said judgment, as he or they shall think fit, for the reco-

very of any arrears of the said annuity, or yearly rent, or sum of £100, and all costs, charges, and expenses (if any) which he the said C. D., his executors, administrators, or assigns, or any of them, shall sustain or be put unto, for or by reason of the non-payment thereof, or of any extra premium of assurance as aforesaid: And it is hereby agreed and declared that the said C. D., his executors, administrators, and assigns, shall by and with and out of the money to be raised by the means lastly aforesaid, pay, satisfy, and discharge the said annuity, or yearly rent, or sum of £100, and all arrears thereof, and all costs, charges, and expenses (if any) to be occasioned by the non-payment thereof, and also any extra premium of assurance as aforesaid, and shall pay the surplus (if any) of the money so to be raised unto the said A. B., his executors, administrators, or assigns, for his and their own use and benefit: And it is hereby further agreed and declared between and by the said parties to these presents, that it shall not be necessary for the said C. D., his executors, administrators, or assigns, to revive, or cause to be revived, the said judgment, or do any other act or thing to keep the same on foot, notwithstanding the same judgment shall have been entered of record for the space of one year and upwards, nor shall it be necessary for him or them to sue out any writ of *scire facias* to assess damages, and that the said A. B., his executors or administrators, shall not, nor will take or attempt to take any advantage of the want of reviving or keeping the said judgment on foot, nor of the want of issuing out any *scire facias* as aforesaid, and that if he or they attempt so to do, by any action or legal proceedings whatsoever, this present agreement shall and may be pleaded and shown in bar thereto, any rule or practice of the courts, or any of them, to the contrary thereof notwithstanding: Provided always, and it is hereby further agreed and declared between and by the said parties to these presents, that after the decease of the said A. B., and full payment to the said C. D., his executors, administrators, or assigns, of the said annuity, or yearly rent, or sum of £100, and all arrears thereof, up to the day of the decease of the said A. B., and all costs, charges, and expenses as aforesaid, the said C. D., his executors, administrators, or assigns, shall and will, at the request, costs, and charges of the heirs, executors, or administrators of the said A. B., acknowledge satisfaction upon the judgment, or the record thereof, in due form of law, or do any other act or thing that may be required for vacating

and discharging the said judgment. And this indenture moreover witnesseth, and the said C. D. doth for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree, to and with the said A. B., his executors, administrators, and assigns, by these presents, that in case the said A. B. shall at any time be minded or desirous of repurchasing the said annuity, or yearly rent, or sum of £100, and of such his intention shall give six calendar months' previous notice in writing to the said C. D., his executors, administrators, or assigns, or leave the same at his or their usual place of abode, or in lieu of such notice, shall pay or tender to him or them one half year's payment of the said annuity ; Then that he the said C. D., his executors, administrators, or assigns, shall and will at any time after the expiration of the said six calendar months' notice to be given as aforesaid, or at the time of such payment or tender in lieu thereof as aforesaid, and on receiving of and from the said A. B., or his assigns, all and every sum and sums of money whatsoever which shall be then due for or on account of the arrears of the said annuity, or yearly rent, or sum of £100, and a proportionate part thereof, up to the day of repurchasing the same, and the sums of money which shall be then due on account of any costs, charges, and expenses, occasioned by the non-payment thereof, or for any extra premium of assurance as aforesaid, accept and take the sum of £800 of lawful money current in Great Britain, in full for the repurchase of the said annuity, or yearly sum of £100, and the said C. D., his executors, administrators, or assigns, and the said J. R., his executors, administrators, or assigns, shall and will thereupon, at the request and at the costs and charges of the said A. B., release, assign, or otherwise dispose of the said annuity, or yearly rent, or sum of £100, and the said messuages, &c., hereinbefore demised, or intended so to be, and all other securities for the same, unto the said A. B., or such other person or persons as he shall in that behalf nominate and appoint, and acknowledge, or cause to be acknowledged, satisfaction of the said judgment, and do every other act and thing necessary or advisable for the releasing, assigning, vacating, and discharging the said annuity, or yearly rent, or sum of £100, and the securities given for securing the same as aforesaid, as by the said A. B., his executors, administrators, or assigns, or his or their counsel in the law shall be reasonably advised and required. In witness, &c.

FURTHER OFFICIAL FORMS OF FIRE AND LIFE INSURANCE.

[FROM JAMES ON LIFE AND FIRE ASSURANCE.]

FORM No. 1.

Proposal for Fire Insurance.

_____ ASSURANCE SOCIETY.

Particulars required from a Person who proposes to Insure Property against Fire with this Society.

Dated *Day of* 185

Name, description, and residence, in full, of the Person in whose Name the Policy is required.

Assurance to take effect from ——— day of ———, 185—, to ——— day of ———, 185—, both inclusive.

	Rate.	Sum.
[Here insert Description and Situation of building to be insured, or in which the property is contained.]		
[State of what materials the walls are composed. Whether the party-walls pass through the roof. What trade is carried on in the premises. What stoves are used, with length of pipes, (if any.)]		
[State if the property, or any part thereof, is now insured elsewhere, naming the office or offices, and the several sums insured therein.]		

	Rate.	Sum.
On Household Goods and Furniture, Linen, Wearing Apparel, Printed Books, Plate, Wines, and Liquors in private use		
On Pictures, Prints, and Drawings		
On China, Glass, and Earthenware		
On Musical and Philosophical Instruments		
On Jewels, Watches, Clocks, and Trinkets		
On Fixtures		
On Stock and Utensils in trade (his own property) ..		
On Stock and Utensils in trade (in trust or on commission)		
	£	

Annual Premium	
Annual Duty	
Odd Time { Premium . .	
Odd Time { Duty	
Policy	
	£

Policy to
Notice to
Agent

FORM No. 2.

Proposal for Life Assurance.

———— ASSURANCE SOCIETY.

CLASS ——. TABLE ——

Particulars required from a Person who Proposes to Assure his own Life with this Society.

1. Name, residence, and profession, or occupation of the person proposing the assurance	
2. Name, residence, and profession or occupation of the person whose life is to be assured	
* 3. Whether in business on his own account? or in whose employ, and how long?	
* 4. If a householder or lodger, and how long? (State name and address of landlord)	
5. Place and date of birth. (State parish, town, and county)	
6. Age next birth-day	
7. Whether the party is now in good health	
8. Whether the habits of the party are, and have been, sober and temperate	
9. Whether the party has ever been afflicted with apoplexy, palsy, fits, convulsions, spitting of blood, habitual cough, asthma, palpitation of the heart, or consumption . .	
10. Whether the party has ever been subject to rheumatism, gout, insanity, rupture, or any other disease or infirmity tending to shorten life. (If so, its nature and extent to be stated)	
11. Whether any member of the party's family has died of the diseases named in the two foregoing queries; that is, either father, mother, brother, or sister. (If answered in the affirmative, particulars to be stated)	
12. Whether the party has had the smallpox or the cowpox from vaccination. (State which)	
13. Whether the party has ever resided abroad; where, for what period, and how long since	
14. Whether the party will attend personally at the chief office, or at a district office	
15. Is the party's life now assured at any other office; if so, in what office? State as near as possible the date when such assurance was effected, and if taken at the ordinary, or at an increased rate of premium	
16. Has the party's life been declined by any other office; if so, state the name of the office, and about the time it was declined	
17. Whether the party is, or has ever been, employed in the military, naval, merchant seamen's, or preventive service	
18. Reference to two respectable persons who are competent to afford information as to the identity, the state of health, and mode of life of the party	1st. The usual medical attendant — Name, Address 2nd. An intimate friend or acquaintance — Name, Address If the party has no medical attendant, then give the name, occupation, and address of another intimate friend, who can speak as to the party's health and mode of life .
19. Sum proposed to be assured, and the nature of the assurance. (Words at length)	

I hereby propose to effect an assurance with the [Sceptre] Assurance Society, of the nature described in Clause No. 19 of the above particulars; and I do hereby declare that I have not withheld any information which is calculated to influence the decision of the Directors as to the eligibility of my Life for such assurance. And I do further agree that the assurance hereby proposed shall not be binding on the society until the amount of premium demanded shall have been paid. Dated this day of 18

Name and Address of Witness in full

[Signed]————

[When an Assurance is required to be made payable on the death of the *first* or *last* of *two* lives, a separate proposal must be filled in and be signed by each of the parties; and the nature of the assurance, whether payable upon the death of the *first* or *last* of the *two* lives mentioned, must be stated in Clause No. 19.]

** If the assurance be intended to be paid on the person attaining a given age, or any previous death, it must be so stated.

* Queries 3 and 4 are only required in Proposals for the Industrial Classes.

Form No. 3.

Proposal for an Endowment.

_____ ASSURANCE SOCIETY.

LIFE DEPARTMENT.

Particulars required from a Person who proposes to Purchase an Endowment with this Society, payable upon the Person Endowed surviving a given age.

1. Name, Residence, and Profession or Occupation of the Person proposing to purchase the Endowment . . . . . .

2. Name and Residence of the party proposed to be Endowed. Specifying the Names of the Parents, their Residence, Occupation, &c.

3. Place and date of birth of the party to be Endowed . . . . . .

4. Age last Birthday . . . . . .

5. The amount of the Endowment, £ When Payable? At

[Here state a day in the year immediately following the birthday at which the Endowment is required to be paid, the deferred term comprising a given number of whole years from the date of the proposal.]

6. Upon what Table?

Whether Premiums will be paid Yearly, Half-Yearly, or Quarterly . . . . . .

I, the undersigned _____

hereby propose to purchase an Endowment for the sum of £_____

on behalf of _____ with the [Sceptre] Assurance Society, upon the terms above specified; I do furthermore agree that this Proposal and Declaration shall be the basis of the contract between myself and the said Society; and I hereby certify that the whole of the foregoing particulars are true. Such Endowment to be subject and liable to the Conditions and Stipulations of the said Society, in that behalf made and provided.

Dated this day of 185

*(Signed)*_____

Name and Address of Witness in full. _____

_____

Form No. 4.

Proposal for a Deferred Annuity.

_____ ASSURANCE SOCIETY.

The Person proposing to purchase a Deferred Annuity, must state:—

1. H Name, Residence, and Occupation	
2. Name, Residence, and Occupation of the person on whose Life the Annuity is required .	
3. Place and Date of Birth	
4. Age next Birthday	
5. Annuity to be granted, £ per annum	
6. Annuity to commence on attaining the age of years	
7. Date of the First Payment of Annuity, day of 18 . .	
8. Amount of Premium, £ how payable	
9. Whether the party on whose Life the Annuity is to be granted will appear for identification at the Chief Office in [*London*], or before an Agent in the Country	
10. Reference to two respectable persons who can speak as to the character of the proposer, and to the identity of the person on whose Life the Annuity is to be granted . . .	

DECLARATION.

I, the above-named_____ being desirous of purchasing a Deferred Annuity, as before described, on the Life of_____ from the [Sceptre] Assurance Society, do hereby declare that the age of_____ will not exceed _____ years on the _____ day of _____ next, and that the several particulars of the above proposals are true. Dated this_____ day of_____ 18

Signature_____

Witness_____

No Medical Examination Required.

*** *A Copy of the Certificate of the Birth of the Person on whose Life the Annuity is to be granted (or some other collateral evidence), will be required to be lodged with the Society.*

Form No. 5.

Proposal for an Immediate Annuity, or an Annuity Assurance.

_____ ASSURANCE SOCIETY.

*The Person proposing to purchase an Immediate Annuity, or Annuity-Assurance, must state:—**

1. H Name, Residence, and Occupation	
2. Name, Residence, and Occupation of the person on whose Life the Annuity or Annuity-Assurance is required	
3. Place and Date of Birth	
4. Age next Birthday	
5. The sum proposed to be paid for the purchase	
6. If the whole amount is to be permanently sunk in the purchase, or any proportion thereof to be refunded on the Death of the Annuitant	
7. What proportion of Purchase-money to be refunded	
8. The Annuity required per annum, £ If payable Yearly, Half-Yearly, or Quarterly	
9. Date of the First Payment day of 18 . . .	
10. Whether the Person on whose Life the Annuity is to be granted will appear for identification at the Chief Office in [*London*], or before an Agent in the Country	

DECLARATION.

I, the above-named _____

being desirous of purchasing _____ as before described, on _____ from the [Sceptre] Assurance Society do hereby declare that the several particulars of the above proposal are true.

Dated this _____ day of _____ 18

Signature _____

Witness _____

No Medical Examination Required.

*** *A Copy of the Certificate of the Birth of the Person on whose Life the Annuity, or Annuity-Assurance, is to be granted, (or some other collateral evidence,) will be required to be lodged with the Society.*

* The purchase of an *Annuity involves* the *sinking* of the *entire sum* paid down; but not so that of an *Annuity-Assurance*, the *whole*, or an *agreed portion* of it, being *returned* to the *representatives* of the *Annuitant* on *death*.

Form No. 6.

Proposal for a Survivorship Annuity.

_____ ASSURANCE SOCIETY.

The Person proposing to purchase the Survivorship Annuity must state :—

1. H Name, occupation, and residence . . . .
2. The name, residence, and occupation of the younger of the two persons, one of the subjects of the proposal . .
3. Place and date of birth . . . . . .
4. Age next birthday . . . . . .
5. The name, residence, and occupation of the elder of the two persons, the other subject of the proposal . . .
6. Place and date of birth of the elder person . . .
7. Age next birthday of the elder person . . . .
8. Whether the elder person is now in good health . .
9. Whether the habits of the elder person are, and have been, sober and temperate . . . . . .
10. Whether the elder person has ever been afflicted with apoplexy, palsy, fits, convulsions, spitting of blood, habitual cough, asthma, palpitation of the heart, or consumption
11. Whether the elder person has ever been subject to rheumatism, gout, insanity, rupture, or any other disease or infirmity tending to shorten life. (If so, its nature and extent to be stated) . . . . . .
12. Whether any member of the elder person's family has died of the diseases named in the two foregoing queries; that is, either father, mother, brother, or sister. (If answered in the affirmative, particulars to be stated) . . . .
13. Whether the elder person has had the smallpox or the cow-pox from vaccination. (State which) . . . . .
14. Whether the elder person has ever resided abroad; where, for what period, and how long since . . . . .
15. Whether the elder person will attend personally at the offices in [*London*], or before one of the medical examiners in the country . . . . . .
16. Is the elder person's life now assured at any other office; if so, in what office? State as near as possible the date when such assurance was effected, and if taken at the ordinary, or at an increased rate of premium . . . . .
17. Has the elder person's life been declined by any other office? if so, state the name of office, and about the time it was declined
18. Whether the elder person is, or has ever been, employed in the military, naval, merchant seamen's, or preventive service
19. Reference to two respectable persons who are competent to afford information as to the identity, the state of health, & mode of life of the elder person — 1st. The usual medical attendant — Name / Address; 2nd. An intimate friend or acquaintance — Name / Address. If the elder person has no medical attendant, then give the name, occupation, and address of another intimate friend, who can speak as to the person's health and mode of life
20. Annuity to be granted; the first payment of annuity to be made at the end of 12 calendar months from the death of the elder of the two persons within named, as the subjects of this proposal . . . . . .
21. Amount of premium, £ how payable . . .

DECLARATION.

I, the above named _____ being desirous of purchasing a Survivorship Annuity, as before described _____ from the [Sceptre] Assurance Society, do hereby declare that the several particulars of the above Proposal are true.

Dated this _____ day of _____ 18

Signature_____

Witness_____

*** A copy of the certificate of the birth of the elder person on whose life the Annuity is to be granted will be required to be lodged with the Society.

Form. No. 7.

Personal Statement in connection with a Proposal for a Life Assurance.

To be made to the Medical Referee of ———————— Life Assurance Society, and attested by the signature of the person whose life is proposed for Assurance.

Mr. _____ of _____

Questions.	Answers.
1. Profession or occupation? Age next birthday? Married or single?	
2. If employed in military or naval service?	
3. If ever has been vaccinated, or had measles, small-pox, or scarlatina?	
4. If ever has been afflicted with disease of the liver or kidneys, with gravel or dropsy? palpitation, asthma, or spitting of blood? with rupture or fistula, rheumatic fever, gout, or rheumatic gout? with cancer, insanity, epilepsy, convulsions, or tendency of blood to the head? If so, with which, and how long since?	
5. If ever had any symptoms of consumption? or of any disease of the chest, the lungs, or the heart? If habitually subject to cough?	
6. If parents alive? If so, state their ages. If not, at what ages, and of what complaints did they die?	Father Mother
7. How many brothers and sisters born? Are they all alive? If not, at what ages, and of what complaints did they die?	Brothers born. / Sisters born.
8. Has any near relative or member of the family died of consumption, or shown any symptoms of pulmonary or heart disease?	
9. If ever met with any serious bodily injury?	
10. If aware of any circumstance touching health or habits, not specially embraced in the above queries, with which the Directors ought fairly to be made acquainted, or which may have a tendency to shorten life, or to render the proposed Assurance more than usually hazardous?	

I declare all the above answers are true,

(Signature) _____

(Witness) _____ (Date) _____

[This form is usually printed on the back of Form No. 8.]

Form No. 8.

Confidential Medical Examination

ON BEHALF OF THE

_____ LIFE ASSURANCE SOCIETY.

To be sent by the Medical Referee *direct* to the Chief Office after the Life has been examined.

Name M_____

Residence of _____

Occupation _____

Aged _____ years next Birthday.

1. Are you related to, or personally acquainted with the person whose life is proposed to be assured ?

2. Please to mention the day on which —he appeared before you for examination, and whether you examined h—, and have perused h— replies to the accompanying inquiries ?

3. Do you consider from h— appearance that —he is the person referred to in the accompanying statement, and that h— age is correctly stated ?

4. Does —he appear to you to be a person of intemperate, or of irregular or dissipated habits ?

5. Does —he seem to you to be a person of a sound and healthy constitution ?

6. Can you elicit any circumstances relating to h— family, which would lead you to suspect that —he may have a tendency to consumption, or to any other hereditary disorder ?

7. Have you examined the state of h— chest by means of the stethescope ? Is h— chest everywhere resonant on percussion, h— respiration free, and the respiratory murmur natural ?

8. Have you examined h— heart by the stethescope ? Are its pulsations, its impulse, and its sounds perfectly natural, and free from bellows sound ?

9. Can you elicit any history of hæmoptysis ? of dropsy ? of epilepsy ? of disease of the liver, kidneys, or urinary organs ? of hernia, or fistula ? or of any disorder of a serious nature ?

10. Is there any thing in h— general aspect which would lead you to suspect the existence of any organic disease, which in your opinion would indicate a predisposition to any complaint having a tendency to shorten life ?

11. Are you acquainted with, or have you heard of any circumstance relating to h— health or habits of life, with which the Directors ought fairly to be made acquainted, in order that they may judge correctly as to the eligibility of the proposed assurance ?

12. Please to describe h— general appearance, whether —he is of slender frame or inclined to fulness; whether —he has any peculiarity of manner or any defect or deformity of person, and whether you consider the Life eligible for Assurance ?

GENTLEMEN, — I, the undersigned, acting as Medical Adviser to the Society for ———— do hereby certify and declare that the above-written answers to the questions are faithful and just, and made according to the best of my knowledge and judgment. And, after due consideration of all particulars relating to the case submitted to me for my opinion, I beg leave to report that

Dated at ————, this ———— day of ————, 185—.

Signed ————

of ————. Professional Title ————.

To the Directors of the ———— Assurance Society.

*** It is usual for Assurance Societies to supply their Medical Referees in the Country with Forms No. 7 and No. 8 *direct from the Head Office*, and not to allow these forms to go into any other hands.

Form No. 9.

LIFE PROPOSAL BOOK.

No.	Date Received.	Life Proposed.	Address.	By whom Proposed.	By whom introduced	Term.					Loan.	Amount.	Accepted, and when.	No. of Policy	Declined, and when.	Withdrawn, and when.	Remarks.
						Life.	Years.	Endowment.	Annuity.	Special.							

FORM No. 10.

LIFE POLICY REGISTER.

Policy No._____ Class_____ Table_____ Date_____

Original Holder_____

Life or Lives Assured_____

Dates of Birth _____ Ages next Birthday _____ Ages assumed in the Policy _____

Sum Assured and Nature of Assurance £ _____

Amount of Periodical Premium £ _____ First Premium due_____ Number of Days allowed for Payment of Renewal Premium _____ Premium payable_____

Proposal No._____ Premium reduced by Bonus to £_____ £_____ £_____ Directors signing the Policy _____

Names, Address, and Occupations of Subsequent Transferees of Policy.	Nature of Consideration of Transfer.	Date of Transfer.	Date of Notice of Transfer.

Policy Lapsed on Failure of Payment of Premiums_____

Policy surrendered to the Society_____ on payment of £_____

Policy became a Claim_____ Claim paid_____ to_____

Sum Assured £_____

Bonus . . . . . £_____

Total paid . . £_____

FORM No. —— *** Notice of Renewal to be sent to_____

FORM No. 11.

FIRE ASSURANCE PROPOSAL BOOK.

[NAME, ADDRESS, AND OCCUPATION OF PROPOSER.]

—— QUARTER.

Number of Proposal.	Date.	Surveyor's Report No.	Particulars of Property.	Result	Number of Policy.	Rate.	Sum Assured.	Charges.			Remarks.
								Policy and Stamp	Premium.	Duty.	

*** An additional Column may be added to this Form, specifying *Town* or *Country* Proposal.

FORM No. 12.

FIRE POLICY DESCRIPTION BOOK.

[NAME, ADDRESS, AND OCCUPATION OF ASSURED.]

—— QUARTER.

Number of Proposal	Number of Policy.	Date.	Description of Property.	Rate.	Sum Assured.	Charges.			Remarks.
						Policy and Stamp	Premium.	Duty.	

*** It is necessary to register the Particulars of *Town* and *Country* Policies in *separate* Books, so as to comply with the requirements of the Stamp Office.

FORM No. 13.

FIRE POLICY.

_____Office.

_____ASSURANCE SOCIETY.

£_____

Payment received on granting this Policy from the _____ day of _____ to the _____ day of _____ 185—

Premium . . £ . .
Policy . . . . .

£ . .

No. _____

Payments to be made yearly for the renewal of this Policy on the _____ day of _____

Premium . . £ . .

WHEREAS, _____ ha— paid the sum of _____ to the [Sceptre] Assurance Society, and ha— also agreed to pay to the said society the sum of _____ on the _____ day of _____ in each year during the continuance of this policy, for assuring from loss or damage by fire, the property hereinafter described, in the place or places hereinafter set forth, and not elsewhere, unless allowed by indorsement previously made hereon, not exceeding in each case the sum specified, namely : —

[Here insert *separately* the sums intended to be assured upon each *House* or *Building*, or upon *each class* of movable property.]

NOW BE IT HEREBY KNOWN, that from the date hereof and so long as the said assured shall duly pay, or cause to be paid, to the society, the said sum of _____ yearly, at the time aforesaid, and the directors of the said society, for the time being, shall accept the same, the Capital Stock and property of the Fire Department of the said society, according to the provisions of the Deed of Settlement of the said society, after satisfying all assurances granted by the said society previously payable, and all other prior charges on such Capital Stock, funds, and property, shall be subject

and liable to pay or make good to the said assured, h— executors, administrators, or assigns, all such loss or damage as shall be occasioned by Fire to the property hereinbefore set forth, not exceeding in each case respectively the sums hereinbefore specified, on the property hereinbefore set forth, subject in every respect to the Conditions indorsed on this policy, and to the provisions of the Deed of Settlement of the said society.

PROVIDED ALWAYS, and it is hereby expressly declared, that the said capital stock, funds, and property of the said society, after making such satisfaction and payment as are before mentioned, shall alone be answerable for the payment of the moneys assured by this policy, and that no director, or officer of the society, or member therein, shall be responsible for the payment of, or any contribution towards the moneys assured by this policy, or liable to any demand against the said society on any pretence whatsoever; and that no person assured by the society shall be liable to any demand against the society on any pretence whatsoever.

GIVEN UNDER THE HANDS OF THREE OF THE DIRECTORS, and Sealed with the Common Seal of the Society, this ———— day of ———— in the year of our Lord one thousand eight hundred and fifty ———

Examined ———— } ———— }
Entered ———— } ———— } DIRECTORS.

Conditions of Fire Assurance under which this Policy is granted.

I. Persons upon making insurances are required to give an accurate description of the buildings, erections, property, and effects intended to be insured. If the insurance is on stock in trade and goods, the nature of the same, and of the buildings or place in which the same are deposited, must be truly described; and if in the buildings insured, or containing any property insured, shall be used any steam-engine, stove, kiln, furnace, oven, or any description of fire-heat, other than common fire-places in private houses, or any process of fire-heat be carried on therein, the same must be noticed and allowed in the policy, and if any omission or misrepresentation take place on any of the foregoing, or any other material point, the policy is void, and the insurance is of no effect. Every insurance attended

with particular circumstances of risk must be so specially expressed in the policy; and in case of any circumstance happening after an insurance has been effected, whereby the risk shall in any way be increased, the insured is required to give notice thereof in writing to the society, and the same must, previous to a loss occurring, be allowed by indorsement on the policy, otherwise the policy is void, and all title to any benefit from the insurance becomes forfeited.

II. The charge for premium is calculated from the *quarter-day* last past, or from the day on which the insurance is effected, to the *quarter-day* ensuing; and for one year, or several years from such quarter-day, as may be agreed on: and unless the future renewal payments be made within *fifteen* days after the period limited for the expiration of the policy, the insurance will cease at four o'clock in the afternoon on the last of such days. Policies for periods less than a year will finally expire at four o'clock in the afternoon of the day of the termination thereof, without the allowance of any extra time.

III. If there be any insurance at any other office of the property insured with this society, notice of every such other insurance must be given, and the same, with the several amounts thereof, must be stated either in the policy, or by an indorsement upon it, otherwise the insurance with this society is void, and the insured not entitled to recover or be paid in case of loss; and in the event of any other insurance with any other office, this society will pay its ratable portion only of any loss, having regard to every other existing policy, in whose name soever such policy may be.

IV. In case of any alteration being made in a building insured, or containing any property insured, or of any steam-engine, stove-kiln, furnace, oven, or any other description of fire-heat being introduced, or of any trade, business, process, or operation being carried on, or goods deposited therein, not comprised in the original insurance, or allowed by indorsement thereon, or the making of any communication from one building to another, notice thereof must be given; and every such alteration must be allowed by indorsement on the policy, and any further premium which the alteration may occasion must be paid; and unless such notice be duly given, such premium paid, and such indorsement made, no benefit will arise to the insured in case of loss.

V. Lease-holders, trustees, and all persons entitled to houses, buildings, and other insurable property, in reversion, may insure the

amount of their respective interests in such buildings and property, provided the nature of the tenure or interest be duly specified. Persons holding goods in trust or on commission, for the value of which they are responsible in case of fire, may insure the same, but the same must be insured as such, otherwise the policy will not extend to cover such property.

VI. Upon the death of persons having property insured with this society, it will not be necessary to make a fresh insurance, provided the policy is continued (as it may be) by indorsement to the person entitled thereto, or the interest in a policy may be transferred, provided the consent of the directors be previously obtained, and an indorsement of the transfer be made on this policy, but not otherwise. If goods be removed to a new situation, notice of such removal must be given and allowed by indorsement on the policy, and a suitable premium paid, if the risk be thereby increased, otherwise the policy will not extend to cover such goods, and the policy, from the time of such removal, will be void.

VII. No loss occasioned by or through any rebellion, riot, tumult, nsurrection, or commotion, or by or through any military or usurped power, or foreign enemy, or thefts, will be made good. Books of accounts, deeds, writings, manuscripts, securities, bills, bonds, ready money, and gunpowder, are not, under any circumstances, insured. The society will not be responsible for any loss arising on hay or corn destroyed or damaged by its own natural heating, but will pay the loss which may happen to any contiguous property insured, in consequence of fire so occasioned. No loss will be allowed for any goods or utensils which may be destroyed or damaged while undergoing any process or manufacture, in or by which the application of fire heat is used. If more than twenty pounds weight of gunpowder shall be upon the premises at the time when any loss happens, such loss will not be made good. The use of gas-lights is allowed, provided the gas is not made on the premises insured; but the society is not responsible for, or liable to, pay any loss or damage occasioned by or through any explosion, whether through gas or otherwise, or for such goods as may be burnt from the careless use of gas-lights, not protected by shades or chimneys, or for clothes or linen burnt while airing, or being placed before an open fire.

VIII. Loss by lightning will be made good by this society, so far

only as either the building or effects insured may have been actually set on fire thereby, and burnt in consequence thereof.

IX. All persons sustaining any loss or damage by fire, are forthwith to give notice thereof to the society, at their chief office in ——————, and within fifteen days after the fire occurring, deliver in writing, as particular an inventory of the property destroyed or damaged, as the nature of the case will admit; such inventory to be in writing, signed by the parties, and to contain a list of the furniture, stock in trade, tools, goods, and other articles claimed for, and with respect to any buildings or erections destroyed or injured, a detailed specification and estimate of the loss or damage is to be furnished, showing the sum necessarily required to be expended to restore or reinstate such buildings or erections; in all cases estimating the worth, whether of buildings, furniture, stock in trade, tools, or other goods, according to the quality and actual condition and value of the property at the time of the fire; * [and the parties insured must make proof of such loss by producing a certificate, signed by two or more householders in the parish or place where the loss or damage was sustained, that, to the best of their knowledge and belief, such fire was not wilfully occasioned by the person claiming compensation;] and produce their invoices, books of account, and all such other vouchers as shall be reasonably required, and by the solemn declaration or affirmation of themselves and their servants when required, without which, no money shall be recoverable. But if there appear any fraud, deceit, or evil practice in the claim made for any loss, or any false declaration or affirming in support thereof, or any collusion or false evidence, or denial, or wilful misstatement, or fraudulent misdescription in the nature or value of the property destroyed, or claimed for, the claimant shall, in every such case, forfeit all right to restitution or payment under or by virtue of his, her, or their policy.

X. Losses, when proved to the satisfaction of the directors, will be made good, either by payment of the amount thereof, or by rebuilding or repairing the premises, or by reinstating or replacing the goods and property destroyed or damaged with others of a like kind, and of equal quality and value, as far as the same is practi-

* The words in Clause IX., within brackets, are required only in policies issued to the Industrial Classes.

cable, and as the sum insured will allow, at the option of the directors. In case any difference shall arise between the assured and the society, touching the amount and restoration of any loss upon any policy in force under these conditions, such differences must be submitted to the judgment and determination of arbitrators, chosen in pursuance of the rules of the society in that behalf made, whose award in writing shall be conclusive on all parties.

All notices are (to prevent mistakes) required to be made in writing, and all indorsements and allowances must be signed by the manager, or one of the clerks, or known agents of the society.

*** No receipts are to be taken but such as are printed, and issued from the society, and signed by the manager, or one of the clerks, or known agents. All reasonable expenses attending the removal of goods in time of danger will be repaid, such claim being made within seven days after the same shall have been incurred.

FORM No. 14.

WHOLE LIFE POLICY.

_____ Office.

Folio_____

Table_____

_____ ASSURANCE SOCIETY.

OWN LIFE. WHOLE TERM.

Annual Premium, £ _____ to be paid [* by _____ Instalments of £ _____ each, due _____]

First Instalment paid £ . .

Policy . . . . . .

£ . .

No. _____

£ _____

---

1. WHEREAS, _____

of _____ the hereinafter designated assured,

hath agreed with the [Sceptre] Assurance Society, for an Assurance of the sum of ———— upon h— own life, for the whole continuance thereof, and hath delivered into the office of the said society a declaration or statement in writing, dated on or about the ———— day of ————, one thousand eight hundred and fifty ———, signed by h——self, containing the several particulars requisite for such assurance.

2. And whereas the said assured hath [*agreed to pay to] the said society the sum of ————, the annual premium or consideration for the said assurance for one year, terminating on the ———— day of ————, one thousand eight hundred and ————, [by ———— [half-yearly, quarterly, monthly, or weekly] instalments of ———— each, due on ————, and to pay all future annual premiums in respect of this policy, by instalments of similar amount, and at the like periods] [*and in part payment of the first annual premium, hath paid to the said society the sum of ————], the receipt of which [*last mentioned] sum is hereby acknowledged.

3. Now this Policy witnesseth, that in case the said assured shall die before or upon the last mentioned day, or in case he shall survive that day, and he or h— assigns shall, on or before that day, and on or before the same day of the last mentioned month in each and in every succeeding year, during which he shall be living, pay unto the said society the sum of ———— then so much of the Capital Stock, Funds, and Property of the Life Department of the society, as by the provisions of the Deed of Settlement of the said society is made liable and applicable to pay assurances issued out of the Life Department thereof, after satisfying all such assurances granted by the said society previously payable, and all other prior charges on such capital stock, funds, and property, shall be subject and liable (according to the provisions of the Deed of Settlement of the said society) to pay to h— executors, administrators, or assigns, within [three] calendar months next after proof shall have been given to the satisfaction of the directors of the said society, of h— death, and of the cause thereof, the full sum of ———— sterling, (*a*) *and also such further sum or sums, if any, as may under*

(*a*) The words of Clause 3, *in italics*, must be omitted where the policy is not on the Profit Scale.

the provisions of the Deed of Settlement of the said society be added by way of Bonus to the sum assured, [*or so much thereof as shall remain after deducting therefrom the amount of such annual premium for the year in which such death shall happen, such year commencing on the ———— day of the month ———— in one year, and ending on the ———— day of the same month in the next and each succeeding year, if the same shall not have been paid, or a due proportionate part of such premium for the time which shall remain between such death and the end of the year in which it shall happen, computed as aforesaid.]

4. PROVIDED ALWAYS, and it is hereby expressly declared, that the said capital stock, funds, and property of the said society, after making such satisfaction and payment as are before mentioned, shall alone be answerable for the payment of the moneys assured by this policy, and that no director, or officer of the said society, or member therein, shall be responsible for the payment of, or any contribution towards, the moneys assured by this policy, or be liable to any demand against the said society on any pretence whatsoever; and that no person assured by the said society shall be liable to any demand against the society on any pretence whatsoever.

5. PROVIDED ALSO, that this policy and the assurance hereby effected, are and shall be subject and liable to the several conditions, restrictions, and stipulations, hereon indorsed, and to the provisions of the Deed of Settlement of the said society, so far as the same are, or shall be, applicable, in the same manner as if the same respectively were here repeated and incorporated in this policy.

6. PROVIDED ALSO, that if any fraud has been practised upon the said society, in effecting the insurance hereby made, this policy shall be void, and all moneys paid thereunder shall be forfeited to the said society.

7. IN WITNESS whereof, the Common Seal of the said Society is hereunto affixed, by order of the Board of Directors; and the undersigned, being three of the Directors of the said society, have hereunto subscribed their names, this ———— day of ———— in the year of our Lord one thousand eight hundred and fifty ————

Examined ———— } ———— }
Entered ———— } ———— } DIRECTORS.

NOTE.—Where the premium is paid *annually*, the words between [brackets,] and marked * must be omitted; and in the second clause the words "*hath paid*," must be inserted instead of "*hath agreed to pay.*"

Conditions of Life Assurance under which this Policy is granted.

I. The [* instalments of the] premium under this policy must be paid within [† fifteen], days of the same becoming due.

II. All such payments must be made at the office of the society where the assurance was effected, unless altered by agreement, and then at the office of the society substituted for it.

III. This policy will be absolutely forfeited, unless [* all instalments of] the premium in arrear be paid within [† fifteen] days after the day on which the [* first of such instalments of the] premium in arrear became due, together with a fine, equal to the amount of one tenth of such arrears; or unless after the expiration of those fifteen days, it be revived, with the consent of the directors, to be given by them if they think proper, within, and not after, twelve weeks from the day whereon the [* first instalment of the] premium in arrear became due, and upon their being satisfied by a medical reëxamination as to the health of the party or parties whose life or lives hath or have been assured, and on payment of [* all the instalments of] the premium in arrear, and of a further fine thereon, to be fixed by the board of directors, of not less than five shillings per cent. on the sum assured.

IV. If the person whose life is assured under this policy shall, without the permission of the directors, go out of Europe, or die upon the high seas, except in passing from one part of the United Kingdom to another; or in passing from one part of Europe to another part of Europe; or if he shall enter into any police force, or the preventive service; or if he shall be engaged or employed in actual warfare in any military or naval capacity; or being or becoming a seafaring person, shall go upon the seas in pursuance of his occupation, then the benefit of this policy shall be forfeited.

V. If the person whose life is assured by this policy shall die by duelling, or by his or her own act, whether sane or insane, or by the hands of justice, the benefit of this policy shall be forfeited, except to the extent of the interest which any person may have previously acquired therein by assignment for valuable consideration, duly notified in writing to the society previously to the death of the person whose life is assured, or by legal lien, and upon such interest being proved to the satisfaction of the directors: — but if this policy be in the possession of the person whose life is assured at the time of such

death, the directors may, if they think fit, pay for the benefit of his family, any sum of money not exceeding the amount the society would have paid to such deceased person for the purchase of his interest in this policy, on the day previous to his death.

VI. All such proof of the death of the person or persons whose life or lives is or are assured under this policy, and of the cause thereof, and all such information respecting the claim made in consequence thereof must be given to the directors as they shall require.

VII. In case of this policy becoming void under these conditions or the provisions within contained, the society shall not be bound to refund any moneys which shall have been received by them in respect of this policy, and all claims against the society in respect of this policy shall be extinguished.

VIII. In case of this policy, or of the moneys hereby assured to be paid, becoming the subject of any trust whatsoever, the receipt of the trustee thereof for the time being may be accepted as an effectual discharge to the society for any moneys payable by the society under such policy, without the society being bound to see the application of such moneys, or being answerable or accountable for the misapplication or non-application thereof.

NOTE.—If the premium be paid *annually*, the words between [brackets, and marked *] must be omitted. The number of days usually allowed for payment of renewal premiums are for *yearly*, *thirty days*; *half yearly* or *quarterly*, *fifteen days*; for *monthly*, *eight days*; and for *weekly*, *four days*. According, therefore, as the premiums are agreed to be paid, the words within [brackets, and marked †] must be varied.

FORM No. 15.

ENDOWMENT ASSURANCE POLICY.

[By which a Sum is Payable to the Person Assured in the event of his Surviving a Particular Age, or Previously Dying.

Substitute the following clauses for those similarly numbered in Form 14.

1. WHEREAS, ——————————————— of ——————————— the hereinafter designated assured, hath agreed with the [Sceptre] Assurance Society, for an Assurance

of the sum of ———————————— upon [his] own life on either of the following events, whichever may first happen, namely, such assurance to be paid to [the assured] or [his] assigns, upon [his] surviving the ———————— day of ————————, 18—, or to the executors, administrators, or assigns of the assured, should [he] die before the said ———————— day of ————————, 18—, *and hath delivered, &c.*, (here take the remaining portion of clause 1, in Form 11.)

3. NOW THIS POLICY WITNESSETH, that in case the said assured shall survive the said day of ————————, 185—, or in case he shall die before or upon the day mentioned in the last preceding clause, or in case [he] shall survive that day, and [he] or [his] assigns shall, on or before that day, and on or before the same day of the month lastly hereinbefore referred to, namely, the ———— ———————— day of the month of ————————, in each and in every succeeding year during which [he] shall be living, up to the said ———————— day of ————————, 18—, first within named, pay unto the said society the sum of ————, then so much of the Capital Stock, Funds, and Property of the Life Department of the said society as is by the provisions of the Deed of Settlement thereof made liable and applicable to pay assurances issued out of the Life Department of the said society, after satisfying all such assurances granted by the said society according to the provisions of the Deed of Settlement of the said society, previously payable, and all other prior charges on such capital stock, funds, and property, shall be subject and liable within [three] calendar months next after proof shall have been given to the satisfaction of the directors of the said society of the assured having survived the said day of ————————, 18—, or of his death happening prior thereto, and of the cause thereof, to pay to [himself], [his] assigns, executors, or administrators, as the case may be, the full sum of ———————————— sterling, and all such further sum or sums, if any, as may under the provisions of the rules of the said society be added by way of Bonus to the sum hereby assured, [or so much thereof as shall remain after deducting therefrom the amount of such annual premium for the year in which either of the events assured against shall happen, such year commencing on the ———— day of the month of ———— in one year, and ending on the ———— day of the same month in the next,

and each succeeding year, if the sum shall not have been paid, or a due proportionate part of such premium for the time which shall remain between the happening of either of the events herein assured against, and the end of the year in which it shall happen, computed as aforesaid].

[Take the *Conditions* under Form 14.]

FORM No. 16.

POLICY ON TWO JOINT LIVES.

Substitute the following clauses for those similarly marked in Form No. 14.

1. WHEREAS, _____ of _____ and _____ of _____ the hereinafter designated assured, alleging themselves to be interested in the lives of each other, have agreed with the [Sceptre] Society, for an assurance of the sum of _____ to be paid on the death of [[1] such of them as shall first die], and have caused to be delivered to the office of the said society, the declarations or statements in writing, dated on or about the _____ day of _____, one thousand eight hundred and fifty _____, thereby declaring amongst other things that the age of the said _____ will not on [his] next birthday exceed _____ years, and that the age of the said _____ will not on [his] next birthday exceed _____ years, the said declarations or statements also containing the several other particulars requisite for such assurance, and the said _____ and _____ have agreed that such assurance when effected shall be [[2] on their joint account, and for their joint benefit], so that in case of there being no disposition thereof to the contrary, by both of them, [[3] the survivor of them] may also be entitled to the benefit of such assurance.

NOW THIS POLICY WITNESSETH, that in case [[4] either] of the said assured shall die before or upon the last mentioned day, or in case

both of them shall survive that day, and they or their assigns shall on or before that day, and on or before the same day of the last mentioned month in each and in every succeeding year, during which both of them shall be living, pay unto the said society the sum of ——————————, then so much of the Capital Stock, Funds, and Property of the Life Department of the society, as by the provisions of the Deed of Settlement thereof is made liable and applicable to pay assurances issued out of the Life Department of the said society, after satisfying all such assurances granted by the said society previously payable, and all other prior charges on such capital stock, funds, and property, shall be subject and liable, according to the provisions of the Deed of Settlement of the said society, to pay [5 to their assigns or the survivor of them, or [his] executors, administrators, or assigns], within [three] calendar months next after the proof shall have been given to the directors of the said society of the death of such one of them as shall first die, and of the cause thereof, the full sum of —————————— sterling, *and also such, &c.* [here take to the end of Clause 3, from Form No. 14.]

[Take *Conditions* as in Form No. 14.]

Form No. 17.

POLICY ON THE SURVIVOR OF TWO LIVES.

A very slight alteration of Clauses 1 and 3 of Form No. 16, will render it applicable to an assurance payable on the *last* of two lives, for instance —

The substitution of the words "both of them," in Clause 1, for the words within the brackets [1]. And the words "for the benefit of the survivor of them," instead of the words within the brackets [2]. And the words "the executors, administrators, or assigns, of the survivor of them," instead of the words within the brackets [3].

In Clause 3.

The term "*both*," instead of "*either*," within the brackets [4]. The words "to the executors, administrators, or assigns, of the survivor of them," instead of the words within the brackets [5]. [Take *Conditions* as in Form No. 11.]

Form No. 18.

POLICY FOR AN ENDOWMENT.

[Payable to a person on attaining a given age, with the option in case of his death, to the person effecting the assurance, of receiving back the premiums (less twenty per cent.) previously paid thereon, or of nominating another person to receive the amount at the period of time the person (deceased) if living would have been so entitled.]

_____ ASSURANCE SOCIETY.

ENDOWMENT POLICY.

No. _____
Date _____
Due _____
Amount of Annual Premium . . £ . .

(MONTHLY.)

Contributions . . . £ . .
Last payment on _____

Substitute the following Clauses for those similarly numbered in Form No. 14.

1. Whereas, _____ of _____ has agreed with the (Sceptre) Assurance Society to effect an Assurance, being an Endowment, for the sum of _____ to be paid to _____ of _____ the hereinafter designated assured, on the _____ day of _____, 185—, in case the said assured shall be then living, [[1] and in the event of his death before such day, then to such person or persons who shall be living on that day as shall, subject to the conditions hereupon indorsed, from time to time in that behalf be duly nominated, but subject always to such option of claiming such payment from the said society in respect of premiums, as in and by the said conditions is reserved [2]], and hath delivered, &c., [here take to the end of Clause 1, in Form 14.]

3. Now this Policy witnesseth, that provided the said assured shall be living on the said _____ day of _____,

18—, [2 or in case of [his] death before that day, if any person or persons who shall, pursuant to the conditions herein indorsed, be nominated by the said ———— to take the benefit of this Assurance, shall be living on the said ———— day of ————, 18—2] and [he] the said ———— or [his] assigns, executors, or administrators, shall do, and in the mean time, and until the said ———— day of ————, 18—, in every year, pay to the said society the premium of ———— ————, then so much of the capital stock, funds, and property of the Life Department of the said society, as is by the provisions of the Deed of Settlement thereof made liable and applicable to pay assurances issued out of the Life Department of the said society, after satisfying all such assurances granted by the said society previously payable, and all other prior charges on such capital stock, funds, and property, shall be subject and liable according to the provisions of the Deed of Settlement of the said society, to pay within [three] calendar months from the said ———— day of ————, 185—, to the said assured, if then living, [3 or to such person or persons then living, as shall be nominated by the said ———— to the benefit of their policy, pursuant to the conditions hereon indorsed 3], the full sum of ———— sterling, *and also such further sum, &c.* [here take remainder of Clause 3, from Form No. 14.]

Conditions of Endowment Assurance under which this Policy is granted.

1. This policy will not become void if the premium, from time to time to become due thereon, be paid within [fifteen] days of the same becoming due; and, though the premium thereon should not be paid within such extended period, this policy may be revived within three calendar months from the expiration of such extended period, upon payment to the society of a fine of five shillings on every one hundred pounds assured, together with a sum equivalent to five per cent. on the premium remaining unpaid.

2. In case of the death of the party nominated by this policy to the benefit thereof before the day fixed as within mentioned for the payment of the sum assured, the party by whom this policy is effect-

ed, or his assigns, executors, or administrators, shall be entitled, upon giving three calendar months' notice in writing to the society, to determine the assurance effected by this policy, and to receive in satisfaction and extinguishment of all claims and demands thereupon, a sum equivalent to the premium or premiums which he or they shall have paid to the society in respect thereof, subject to a deduction of one tenth thereof which may be retained by the society; or —

3 In case and so often as it shall happen that the party nominated by this policy to the benefit thereof as within mentioned, or any person or persons from time to time to be nominated as hereby authorized to the benefit of the said policy, in the stead or place of the party nominated to the benefit thereof as within mentioned, shall die before the day fixed as within mentioned for the payment of the said sum assured, then the person by whom this policy is effected, or his assigns, executors, or administrators, shall be entitled to nominate, as hereby prescribed, any other person or persons to take the benefit of this policy, and of the assurance hereby effected; and the person or persons so nominated shall have and take the benefit thereof accordingly, subject nevertheless to the chance of his or their being deprived of the benefit thereof by the exercise of the option mentioned in the said second condition in the same manner, and as fully, effectually, and advantageously, as if he or they had been nominated to the benefit of this policy, and of the assurance thereby effected by this instrument itself, provided nevertheless that every such nomination, in order to be effectual, shall be in writing under the hand or hands of the parties entitled to exercise the same, and be deposited or left with the said society at their office aforesaid, within three calendar months next immediately after the exercise thereof, and that for and in respect of every such nomination, a fee after the rate of five per cent. upon the said sum assured be paid to the society within such three calendar months, and that each and every nomination shall be made in such form as may be required by the directors for the time being of the society, should they be pleased to prescribe such.

4. Any sum payable by the society under this policy shall not carry interest against the society, and the society shall cease to be liable for such sum, if the same be not claimed by or on behalf of the party or parties entitled thereto, within ten years next after that the same shall have become due.

5. That in case of this policy or of the moneys hereby assured to be paid becoming the subject of any trust whatever, the receipt of the trustees for the time being of the said policy or moneys may be accepted as an effectual discharge to the society for any moneys payable by the society under such policy, without the society being bound to see to the application of such moneys, or answerable or accountable for the misapplication or non-application thereof.

FORM No. 19.

POLICY FOR AN ENDOWMENT.

[Payable to a person on attaining a given age, without Return of Premium, or option to Nominate another person in his stead, in case of previous death].

Take Clause 1 of Form No. 18, omitting the words between brackets [1].

Omitting the words in Clause 3, also between brackets [2].

And omitting also the words in the same clause between brackets [3].

Take Clauses 2, 4, 5, 6, and 7, from Form No. 11.

Take Conditions 1, 4, and 5, from Form No. 18, omitting Conditions 2 and 3.

Form No. 20.

DEFERRED ANNUITY POLICY.

———————— ASSURANCE SOCIETY.

First payment received by the society on granting this policy for the Annuity undermentioned.

Premium . . £ .
Policy . . . .
£ .

No. ————————
For the renewal of this Policy, the premium or sum of £———— is to be paid on the day or days mentioned in the body of this Policy, up and including the ——— day of ———, 18—
The Annuity by this Policy assured to be paid, will, subject as hereinafter expressed, be payable annually on the ———————— in each year, the first of such payments to be made on the ——— day of ———, 18—

Substitute the following clauses for those similarly marked in Form No. 11.

1. Whereas, ———————————————— of ———————————— hath agreed with the [Sceptre] Assurance Society, to effect an assurance for an annuity of ———————— pounds to be payable to [him] or [his] assigns, on [his] attaining the age of ———————— years, and thenceforth during [his] life, the first payment to be made on the ———————— day of ————————, 18—; and hath delivered, &c. [here take remainder of Clause 1, from Form No. 14.]

2. And whereas the said ———————————— hath paid to the directors of the said society the sum of ———————————— as the first premium for such proposed assurance.

3. Now this Policy witnesseth, that if the said ———————— shall be living on the ———————— day of ———————— 18—, and [he] or [his] assigns shall in the mean time on the ———————— day of ———————— in each and every year, pay unto the said society the premium or sum of ————————————, then so much of the capital stock, funds, and property, of the Life Department of the said society, as by the provisions of the deed of Settlement thereof is made liable to pay assurances issued out of the Life

Department of the said society, after satisfying all such assurances granted by the said society previously payable, and all other charges on such capital stock, funds, and property, shall be subject and liable, according to the provisions of the Deed of Settlement of the said society to pay to the said _____ or [his] assigns, and from and after the said _____ day of _____, 18—, and thenceforward during [his] life, one Annuity or clear Yearly Sum of _____ sterling, to be payable at the times and in the manner mentioned at the head of this policy.

NOTE. — If the premium be paid half-yearly, quarterly, monthly, or weekly, a condition must be inserted (something similar to that in Form 14) in the body of the policy, by which it is declared that, in case the same be not paid within a given number of days after its respectively coming due, that the Policy will be void, and the annuity be forfeited.

FORM No. 21.

POLICY FOR SURVIVORSHIP ANNUITY.

_____ ASSURANCE SOCIETY.

£_____

First payment received by the society on granting this Policy for the Annuity undermentioned

	£	.	.
Policy			
	£	.	.

No. _____

For the renewal of this Policy, the premium or sum of £ _____ is to be paid on the day or days mentioned in the body of this Policy, up to the death of the person, after whose decease the annuity becomes payable.

The Annuity by this Policy assured to be paid will, subject as hereafter expressed, be paid annually; the first of such payments to be made twelve calendar months after the death of the person upon whose decease the same becomes payable.

Substitute the following clauses for those similarly numbered in Form No. 14.

1. WHEREAS, _____

of _____ and _____

of _____ have agreed with the [Sceptre] Assurance Society, to effect an assurance of an annuity of _____

————————pounds, to be payable to the said ———————— or [his] assigns, and henceforth during [his] life only, after the decease of the said ————————, *and have cause to be delivered*, &c. [here take portion of Clause 1, in Form No. 16, to the end of the declaration of ages].

[Here take Clause 2, of Form No. 20.]

3. NOW THIS POLICY WITNESSETH, that if the said ———————— ———————— and ———————— shall on the ———————— day of ———————— in each and every year during the joint continuance of their lives, pay, or cause to be paid, unto the said society, the premium or sum of ————————, then and in such case, but subject only to the decease of the said ————————, and upon proof thereof given to the satisfaction of the directors of the said society, and of the cause thereof, so much of the Capital Stock, &c. [here copy the portion of Clause 3, of Form No. 20, commencing with "*Funds and property*" to "*or his assigns*,"] from and after the decease of the said ————————, and thenceforward during [his] life, an Annuity or clear yearly sum of ———————— sterling, to be payable at the time and in the manner mentioned at the head of this policy.

[For the Conditions to this Policy, see Form No. 14.]

[See also Note to Form No. 20, as to Half-yearly, Quarterly, Monthly, or Weekly Payments."

FORM No. 22.

POLICY FOR A TERM LIFE ASSURANCE.

*Life of Another.**

[Payable only if the person assured dies within the term or period of assurance.]

Substitute the following Clauses for those similarly marked in Form No. 14.

1. WHEREAS ————————

* This Form can be very easily altered for an *Own Life Policy*, by omitting those portions of clauses 1 and 3 which refer to *the party or parties assuring the life of another.*

the hereinafter designated assured, alleging ———— to be interested in the life of ———— of ———— ——— ha— agreed with the [Sceptre] Assurance Society for an Assurance of the sum of ———— upon the life of the said ———— for the term of ———— years, commencing on the ———— day of ———— one thousand eight hundred and fifty ——, and terminating on the ———— day of ————, one thousand eight hundred and ———, both inclusive, and ha— delivered into the office of the said Society a declaration or statement in writing, dated on or about the ———— day of ————, one thousand eight hundred and fifty ——, signed by the said ————, containing the several particulars requisite for such assurance.

2. And whereas the said assured hath paid to the said Society the sum of ————, the annual premium or consideration for the said assurance for one year, terminating on the ———— day of ————, one thousand eight hundred and ———, the receipt of which is hereby acknowledged.

3. Now this Policy witnesseth, that in case the said ———— ———— shall die before or upon the last mentioned day, or in case ——— shall survive that day, and the said assured or ——— assigns shall, on or before that day, and on or before the same day of the last mentioned month in each and in every succeeding year of the said term of ———— years, during so many years thereof as the said ———— shall live, pay unto the said society the sum of ————, and the said ———— ———— shall die during any period of the said term of ———— years, then the Subscribed Capital Stock of the Society, and other the stock, funds, and property of the Life Department thereof, after satisfying all assurances issued by the said society out of the Life Department previously payable, and all other prior charges on such capital stock, funds, and property, shall be subject and liable, according to the provisions of the Deed of Settlement of the said Society, to pay to the said assured, ——— executors, administrators, or assigns, within three calendar months next after proof shall have been given to the satisfaction of the directors of the said society, of the death of the said ———— and of the cause thereof, the full sum of ———— sterling.

[Take Conditions as in Form No. 14.]

Form No. 23.

POLICY FOR A CONTINGENT ASSURANCE.

Or, One Life against Another.

[Payable on the decease of one person, provided he dies before another person named in the Policy.]

Substitute the following clauses for those similarly numbered in Form No. 14.

1. Whereas [A. B.], the hereinafter designated assured, hath proposed to effect an assurance with the ———— Assurance Society upon the life of [C. D.] against the life of [E. F.], for the whole of the *joint* continuance of such lives, in the sum of ————————, to be paid by the said society, in the event of the death of the said [C. D.] in the lifetime of the said [E. F.], *but not otherwise;* and ha— delivered into the office of the said society a declaration or statement in writing, bearing date on or about the ———— day of ————————, one thousand eight hundred and fifty ——, containing the several particulars requisite for such assurance.

2. And whereas the said assured ha— paid to the directors of the said society the sum of ————————, as the premium or consideration for the assurance of the said sum of ———— upon the life of the said [C. D.] against the life of the said [E. F.] for one year, terminating on the ———— day of ————————, one thousand eight hundred and ————, the receipt of which sum is hereby acknowledged.

3. Now this Policy witnesseth, that if the said [C. D.] shall shall die in the lifetime of [E. F.], and on or before the ———— day of ———— in the said year one thousand eight hundred and fifty ——; or in case both of them, the said [C. D. and E. F.] shall survive that day; and the said [C. D.] shall afterwards die in the lifetime of the said [E. F.], and the said assured, h— executors, administrators, or assigns shall, before or upon the said ———— day of ————————, one thousand eight hundred and fifty ——, and on or before the same day of the last mentioned month, in each and every succeeding year during which both of the said [C. D. and E. F.] shall be living, pay or cause to be paid to the said society the sum of ————————, then the subscribed Capital

Stock of the society, and other the stocks, funds, and property of the Life Department thereof, after satisfying all assurances issued by the said society out of the Life Department previously payable, and all other prior charges on such Capital Stock, funds, and property, shall be subject and liable, according to the provisions of the Deed of Settlement of the said society, to pay to the said assured, h— executors, administrators, or assigns, within [three] calendar months next after proof shall have been given to the satisfaction of the directors of the said society, of the death of the said [C. D.] in the lifetime of the said [E. F.], and of the cause thereof, the full sum of ———— ———— sterling.

[Take Conditions as in Form No. 14.]

[NOTE.—If the policy be taken out by *one* of the *parties whose life* is the *subject* of assurance, such party interested must be the *designated assured.*]

FORM No. 24.

LIFE POLICY PAYABLE TO HOLDER BY INDORSEMENT.

(The making of Fire Policies transferable by Indorsement has long been practised, and the adoption of the like principle to Policies of Life Assurance, which has been very recently introduced, cannot fail to be highly advantageous to the public; an addition, therefore, in a Life Policy, to the usual clause of "payment to heirs, executors, administrators, and assigns," has been deemed necessary to be appended to this work.)

Take Clauses and Conditions as laid down in Form No. 14, and after the words (in Clause 3) "to pay to his heirs, executors, administrators, and assigns," insert "or to such person or persons as the hereinbefore designated assured, shall, by Indorsement in writing under his or her hand, appoint to receive the same, provided always nevertheless that no such Indorsement shall be deemed to be valid, or be effectual, unless it be attested by at least two persons, who shall declare themselves to have been witnesses of the delivery of the Policy to the person or persons so therein declared entitled to it, and unless it be notified in writing to the Society, within thirty days from the date thereof, by the person in whose favor the Indorsement shall have been made; or furthermore to pay the same (but subject

always to the like restrictions) to such person or persons as the person or persons beneficially named in the last preceding Indorsement shall from time to time declare to be entitled to receive the same; and it is hereby expressly covenanted and declared, that so far as relates to any Indorsement or Indorsements to be made at any time in respect of this Policy, the person or persons so from time to time beneficially named in the last preceding Indorsement, shall alone be deemed to be the holder or holders of the Policy, and be alone entitled to receive the sum or sums payable under the same.

FORM No. 25.

INDORSEMENT UPON A LIFE POLICY.

I, (or we,) the undersigned, the within-designated assured, (or the person or persons declared in the last preceding Indorsement to be alone entitled to the within-written Policy, and to alone receive the sum or sums assured thereunder,) do hereby grant and transfer all my (or our) right, title, estate, and property in the said policy unto ——————————, of ——————————, his (or *her* or *their*) heirs, executors, administrators, and assigns, absolutely, and do hereby appoint, without power of revocation on my (or our) part, the said ——————————, his heirs, executors, administrators, and assigns, to alone receive all sum or sums of money from time to time payable under the said Policy. And I (or we) do furthermore declare, that I (or we) have now a good and lawful title to such policy, and have not, at any time prior to this transfer, assigned, conveyed, or in any way charged or encumbered this Policy to or for the benefit of any other person whatever. In witness whereof, I (or we) have hereunto set my (or our) hand, this —— day of ——————, 185—.

Witnesses to the Signature of the said ——————, and of the delivery by him of the within-writtten policy to the said ——————.

A. B. ——————
C. D. ——————

FORM No. 26.

LIFE GUARANTY, OR COUNTER-ASSURANCE.

No. ——. £———.

MEMORANDUM.—The [Sceptre] Assurance Society hereby Guarantees, out of the funds of the said Society, to the Directors of the [English and Cambrian Assurance Society] the Sum of ———— ———————— in part of that [Society's] risk to the extent of ———————— sterling, upon the ———————— ———————— of ———————— assured by them, under their policy No. ——, issued to, and in the name of ———————— the therein designated Assured: the stamp duty payable to Government in respect of such Assurance being first paid and accounted for by the said [English and Cambrian Assurance Society.]

The said Guaranty is from the ———— day of ———— 185—, to the ———— day of ————, 185—, both inclusive; and so long thereafter as shall be expressed in the usual Renewal Receipt of the Society, and is subject to the Provisions of the Deed of Settlement, and to the Conditions of Life Assurance of the [Sceptre] Assurance Society.

Consideration . . { Present Payment . . . £———— / Future Payment . . . £————

Given *under the Hands of Three of the Directors*, and sealed with the Common Seal of the Society, this ———— day of ————, in the year of our Lord one thousand eight hundred and fifty ——.

Signed in the presence of { ———— / ———— / ———— } Directors.

Examined ————————

Entered ————————

(*** A policy will be issued on payment of the stamp duty.)

FORM No. 27.

FIRE GUARANTY, OR COUNTER ASSURANCE.

No. ——— £———

MEMORANDUM.—That the [Sceptre] Assurance Society hereby Guarantees, out of the funds of the said society, to the Directors of the [Star] Assurance Company, the sum of ——————— sterling, in part of that Company's risk to the extent of ——————— upon property assured by them, under their policy, No. ———, and dated the ——————— day of ———————, 185—, issued to and in the name of ——————— the therein designated Assured, the Duty payable to Government, in respect of such Assurance, being first paid and accounted for by the said [Star] Assurance Company.

The said Guaranty is from the ——— day of ———————, 185—, to the ——— day of ———————, 185—, both inclusive, and so long thereafter as shall be expressed in the usual Renewal Receipt of the Society, and is subject to the Provisions of the Deed of Settlement, and Conditions of Fire Assurance of the [Sceptre] Assurance Society.

Dated the ——— day of ———————, 185—.

Consideration . . { Present payment . . . £——————— / Future annual payment £———————

——————————— } Directors.

Signed in the presence of

———————————

Examined ———————————

Entered ———————————

(*** It is not usual to stamp these Guaranties.)

FORM No. 28.

ASSIGNMENT OF A LIFE POLICY.

TO ALL TO WHOM these Presents shall come, I, ———————————— of ————————————,

send greeting. WHEREAS by an instrument or Policy of Assurance, numbered ——, under the Hands of Three of the Directors of the ———— Assurance Society, and bearing date on or about the ———— day of ————, one thousand eight hundred and ———, in consideration of the premium or premiums therein mentioned, a sum of ———————————— is assured to me, or my executors, administrators, or assigns, by the said society, and payable within [three calendar months] next after proof shall have been given, as therein mentioned, of —— decease ———————— ————————————————————, subject nevertheless to certain conditions, restrictions, and agreements, in the said instrument or Policy mentioned. NOW KNOW YE, that in consideration of the sum of ————————, of lawful money of Great Britain, to me paid by ————————————————, before the execution of these presents, (the receipt whereof I do hereby acknowledge,) I have bargained, sold, assigned, transferred, and set over, and by these presents do bargain, sell, assign, transfer, and set over to the said ————————————, h—— executors, administrators, and assigns, all that the said instrument or Policy of Assurance, numbered ——, so effected as aforesaid, and all money which shall or may become due and payable thereon, or by virtue thereof; and all my right, title, and interest therein and thereto, and all the benefit and advantage thereof, or to be had or derived therefrom. To have, hold, receive, take, and enjoy, the said instrument or Policy of Insurance, and all and singular the moneys and premises hereby assigned or intended so to be, to the said ———— ————————, h—— executors, administrators, and assigns, as and for h—— and their own proper money and effects for ever (subject to the payment of the premium or premiums hereafter to become due and payable thereon). Together with all powers and remedies for recovering and receiving the money thereby assured, or which shall become due and payable under and by virtue of the said policy, as fully and effectually, to all intents and purposes, as I, my executors, or administrators, could do or have done, in case these presents had not been made. And with full power and authority to sue for and to give effectual receipts and other discharges for the same money, and every part thereof, without any further consent or concurrence by or on the part of me, my executors, administrators, or assigns. And for all or any of the purposes aforesaid, to use the

name or names, and act as the attorney or attorneys of me, my executors, or administrators. And I do hereby, for myself, my heirs, executors, and administrators, covenant with the said ——————————, —h—— executors, and administrators, that I now, at the time of the sealing and delivering of these presents, have in myself good right, full power, and lawful authority, to assign and make over the said instrument or Policy of Assurance, and the money thereby secured, or which shall become due and payable thereon or by virtue thereof, unto the said ——————————————————, —h—— executors, administrators, and assigns, according to the true intent and meaning of these presents, free and clear of all encumbrances, claims, and demands whatsoever (except the annual and other premiums hereafter to become payable thereon). And that the said instrument or Policy of Assurance has been duly obtained, and that the same now is in full force and effect, and not in anywise annulled, forfeited, or become void or voidable. And further, that I, my executors, or administrators, shall not nor will at any time or times hereafter, without the consent, in writing, of the said ——————————————, —h—— executors or administrators, or the order, judgment, or decree of some court of law or equity, for that purpose first had and obtained, receive, release, acquit, or discharge, all or any part of the said instrument or Policy of Assurance, money, interest, and property hereby assigned, or otherwise assured or intended so to be; nor without such consent, order, judgment, or decree, revoke or countermand all or any of the powers and authorities hereinbefore contained and given to the said ——————————————, —h—— executors, administrators, or assigns. And that I, my executors, or administrators shall not, nor will at any time or times hereafter, do or commit any act, deed, matter, or thing whatsoever, to vitiate, injure, forfeit, annul, or make void the said instrument or Policy of Assurance hereby assigned or intended so to be; but, on the contrary, shall and will at all times hereafter, observe, fulfil, and keep, all and singular the conditions, stipulations, and agreements mentioned and contained in the said instrument or Policy of Assurance, or therein referred to; and which, on the part and behalf of me, my executors, or administrators, are or ought to be observed and performed according to the true intent and meaning thereof respectively (excepting the future payments of the premium or premiums to become payable thereon as aforesaid.) And further,

that I and my executors and administrators, shall and will from time to time, and at all times hereafter, at the request, cost, and charges of the said ——————————————, —h—— executors, administrators, or assigns, make, do, and execute, all such further and other acts, deeds, matters, and things, as shall be deemed requisite in the law, for better or more absolutely confirming the assignment hereby made, and enabling the said ——————————————, —h—— executors, administrators, and assigns, to recover and receive all and singular the sum and sums of money which shall become payable or recoverable under or by virtue of the said instrument or Policy of Assurance, and the assignment thereof hereby made. In witness whereof, I have to these presents set my hand and seal, this ———— day of ————, in the year of our Lord one thousand eight hundred and ————.

Signed, sealed, and delivered by the above-named ——————————— in the presence of } ————

Received on the day and year last above-written, from the above-named ——————————— the sum of ———————, being the consideration-money above-mentioned to be paid by h—— to me. } ————

Witness ———————

Form No. 29.

INDORSEMENT FOR FIRE POLICY.

[Where the Property Assured is Removed to *other* premises than those upon which the same were *previously* assured.]

Memorandum. — That the several goods, chattels, and effects mentioned in the within-written Policy are now removed to the premises situate and being at [No. 7, Vincent Street, Glasgow,] where the same are alone assured. Dated this ———— day of ————————, 185—.

(Signed)———————————

[Manager, Clerk, or Agent of the ——— Assurance Society.]

Witness, ———————.

FORM No. 30.

INDORSEMENT FOR FIRE POLICY.

[Where the Property Assured is transferred from *one* person to *another*.]

MEMORANDUM. — That the several goods, chattels, and effects assured by the within-written Policy are now assigned and transferred from the within-named [A. B.] to [C. D.], of No. 6, Trinity Street, in the borough of Southwark, [Licensed Victualler]. Dated this ——— day of ———————, 185—.

(Signed) A. B.

E. F. [Manager, Clerk, or Agent of the ——— Assurance Society.]

Witness, ———————.

RESTRICTIONS

In American Policies on Lives, as to the going abroad of the Assured, &c.

That in case the said [*the person whose life is insured*] shall *without the consent* of this company, previously obtained and indorsed upon this Policy, visit Oregon, California, or New Mexico, or pass beyond the settled limits of the United States, (except into the settled limits of British America,) or shall, without such previous consent thus indorsed, visit those parts of the United States which lie south of the southern boundaries of the States of Virginia, Kentucky, and Missouri, between the first day of July and the first day of November, or shall, without such previous consent, thus indorsed, enter into active military or naval service, &c. [see *infra*, §§ 284, 285,] or shall, without such previous consent, thus indorsed, be personally employed as an engineer or fireman in running a locomotive or steamer, or in the manufacture of gunpowder, or in case the said [*the person whose life is insured*] shall become so far intemperate as to seriously impair health, or induce delirium tremens. [Then the usual conditions as to dying by his own hand, or by a duel, or by the hands of justice. See *infra*, Chap. XIII.] Some policies require the consent of the company, as to voyage by sea, or upon lakes, &c., as they may think expedient.

FORMATION OF TABLES OF MORTALITY.—THE INFLUENCE OF OCCUPATION, AND DENSITY OF POPULATION, ON LONGEVITY.

[FROM JAMES ON LIFE AND FIRE ASSURANCE.]

The establishment of Life Assurance is universally acknowledged to be one of the wisest and most important features of modern civilization; and the highly interesting inquiries with relation to the sanitary condition of the population of the United Kingdom which its introduction has particularly given rise to, may fairly be said to have promoted that decided step towards the amelioration of public health, which is now being made by the Government, and a great body of philanthropic individuals among the professional and wealthy classes.

The practice of Life Assurance is founded on the doctrine of probabilities, which proceeds on the hypothesis, that *a circumstance, or train of circumstances, which has once occurred will occur again.* One of the most interesting and valuable applications of the calculations of probabilities, is the formation of tables of mortality, their object being to make known the law according to which a certain number of individuals, born at the same period, necessarily die.

The operations of Life Assurance are based on the results deduced from such Tables of Mortality compiled in particular districts, or extending over a large amount of population; by which it is ascertained how many persons of a certain number born (say for instance 100,000) complete a given age, die in each year of age from birth, or live to the oldest age upon the table. It is by means of a table of this kind, combined with interest of money, in such a ratio thereof as may be properly applied to transactions of this kind, having due regard to its continual variation, and the nature of the risk incurred, that the values of life annuities are obtained; from which annuities, all the premiums charged by the various Assurance Companies are subsequently deduced. As in the instance of the purchase of a freehold estate, or a perpetual or a limited annuity, so with reference to a life insurance,—its own abstact value must be first ascertained, which may afterwards be increased or decreased, according to the rate of interest the particular investment is expected to return, so that the lower the scale of profit may be to the purchaser, the higher will be the price required.

It may therefore be inferred that the average duration of life forms the foundation of all assurance calculations, and the broader the basis of that average can be made, the easier, the safer, and more successful must be the results of the business of a life office.

At the close of the seventeenth century, the attention of learned men, both on the continent of Europe and in England, was drawn to the subject of vital statistics, and great labor and research applied to the formation of tables of mortality, as deduced from actual observations.

" Halley, who constructed the first table of mortality, (in 1693,) employed the following method : — He made for the city of Breslaw, in Silesia, an enumeration of all individuals who, in the period of four years, died between birth (0) and 1 year ; between 1 and 2 years ; between 2 and 3 years ; and so on, to the most advanced period of life ; at the same time considering the population as stationary, or as affording annually a number of deaths equal to the number of births, and that all the individuals whose deaths he enumerated, had been born at the same time, he deduced from the respective ages the laws according to which they successively perished.

" He took the sum of all the deaths, deducting from the number infants which died between birth (0) and 1 year, the remainder indicated the number of survivors ; from this last remainder he deducted the number of infants which died between 1 and 2 years, to obtain the number of survivors, and so on." (*a*)

We may also particularly refer to the Swedish tables, constructed from returns collected in the years from 1770 to 1776 inclusively, and from the whole population of Sweden and Finland. This table has, however, been since recently corrected from later data. The next table, and a highly valuable one too, (because it approximates so nearly to English authorities, to which we will presently refer,) is that of Mons. De Parcieux, in which is exhibited the mortality prevailing amongst the nominees of the French Tontines.

Of the tables of mortality most known and appreciated in England, we must mention the table of mortality deduced from observations made in London, during upwards of twenty years, which included

(*a*) " Popular Instructions on the Calculations of Probabilities ; translated from the French of M. A. Quetelet, by Richard Beamish, Esq., C.E., F. R. S., &c." London : John Weale. 1839.

the year 1740, when the mortality was considered almost equal to the plague. By this table the life premiums of the Equitable Assurance Society were first adjusted; but that office afterwards adopted, and has since retained, the Northampton Table of Mortality; and the London Table, from its total inapplicability to present circumstances, has fallen into disuse.

The Northampton Table was formed by Dr. Price from the bills of mortality during a period of from the year 1735 to 1780, in the parish of All Saints, in that town, which then contained a little more than half of its population, and on the supposition of a stationary population, whereas it was an increasing one. The results of this table represent the declension of life to be much greater than the actual average of the general population, and therefore as an authority it is not deemed so valuable, nor is it used so frequently by the various life offices as formerly.

The Carlisle Table was framed by Mr. Milne, from observations made by Dr. Heysham of the mortality in that town during the years 1779 – 1787, upon a population of 8,000 persons, — and represents the general mortality to be much less than that shown by the Northampton Table; and, as a whole, redounds greatly to the credit of its compilers, and will be a lasting monument of their research and labor. In consequence, however, of the prevalence of smallpox during the period of observation, and the want of a greater number of lives at particular ages, and the table not being graduated, but confined strictly to the data afforded at each age, the Carlisle Table is not to be recommended for *temporary* assurances; for, on account of the irregularities in the probabilities of dying in one year at several of the ages, the premiums deduced from them would in some instances be greater for young lives than old ones. Such irregularities would also materially affect *survivorship assurances.*

The Equitable Experience Table was formed by Mr. Griffith Davies, from the decrements of life amongst the members of the Equitable Society; and subsequently by Mr. Morgan, from more complete data.

The Government Table was compiled by Mr. Finlaison, Actuary to the National Debt Office, having separate values for male and female lives, the rate of mortality on the females especially being much lower than most other tables, — indeed, they almost approach to an extreme, — perhaps too great to be adopted in general practice.

The more recent tables, — and those, indeed, entitled to high consideration by the various assurance institutions and the public, on account of their correct exhibition of the mortality of assured lives, and of the general population, — are the Offices' Experience Table, the English Life Table, and the Chester Table.

The Offices' Experience Table was compiled by a Committee of Actuaries, in and after the year 1838, from the experience of seventeen established companies, deducted from 62,537 assured lives.

The English Life Table, forming the present national standard of human life, was compiled by Mr. Farr, from the Reports of the Register-General of Births and Deaths in England, in the years 1840 and 1841.

The Chester Table was compiled by Dr. Haygarth, from observations made by him at Chester. This Table originally appeared in the second volume of Dr. Price's well-known work on Reversionary Payments.

We subjoin a Table of the comparative Expectations of Life, as deduced from the authorities named : —

Age.	Northampton.	Carlisle.	De Parcieux.	Offices' Experience.	English Life.
	Years.	Years.	Years.	Years.	Years.
25	30.85	37.86	37.17	37.98	36.99
35	25.68	31.00	30.88	30.87	30.41
45	20.52	24.46	23.89	23.69	23.86
55	15.58	17.58	17.25	16.86	17.15
65	10.88	11.79	11.26	10.97	11.19

We now append the present values of Annuities on Single Lives, and on Two Joint Lives of equal ages, deduced from the same authorities, — interest of money being reckoned at four per cent. The upper figures denote the *single*, and the lower ones the *joint* annuities : —

Age.	Northampton.	Carlisle.	De Parcieux.	Offices' Experience.	English Life.
20	16.033 12.535	18.362 15.610	17.930 14.973	18.451 15.778	18.084 15.115
30	14.781 11.313	16.852 13.930	16.810 13.918	17.040 14.305	16.702 13.798
40	13.197 9.820	15.074 12.125	15.130 12.318	15.093 12.299	14.999 12.079
50	11.264 8.081	12.869 9.748	12.520 2.617	12.470 9.672	12.669 9.794
60	9.039 6.030	9.663 6.630	9.710 7.067	9.415 6.717	9.521 6.779

We now furnish examples of the *single* and *annual premiums* required for the assurance of £100, as deduced from the like sources, upon Single Lives, interest of money being reckoned at three per cent. The upper figures denote the single, and the under ones the annual premiums : —

Age.	Northampton.	Carlisle.	De Parcieux.	Offices' Experience.	English Life.
20	£ s. d. 42 16 1 2 3 7	£ s. d. 33 18 0 1 9 11	£ s. d. 34 16 10 1 11 2	£ s. d. 33 12 0 1 9 6	£ s. d. 34 18 8 1 11 4
30	47 16 0 2 13 5	40 2 7 1 19 1	39 18 4 1 18 9	39 11 1 1 18 2	40 13 0 1 19 9
40	53 16 10 3 7 11	47 3 2 2 12 0	46 16 3 2 11 3	47 4 4 2 12 2	47 11 8 2 12 11
50	60 17 4 4 10 8	55 8 7 3 12 5	56 11 10 3 16 0	56 16 9 3 16 9	56 2 8 3 14 7
60	68 12 3 6 7 4	66 10 8 5 15 10	66 8 9 5 15 4	67 8 4 6 0 6	67 1 0 5 18 7

It will be here remarked, how nearly the De Parcieux, Offices' Experience, and English Life rates approximate to each other ; and widely as the Northampton and Carlisle rates differ in the younger ages, how much more they approach to each other, and to the three first-named authorities, in the older lives.

We may observe that the Northampton Table is still used by several of the older English offices, although some have recently

adopted the Carlisle or Offices' Experience. The majority of the new companies apply the Carlisle, Offices' Experience, Equitable Experience, or English Life Table. A series of Annuities and Assurances, deduced from the last mentioned table, has been expressly computed for the second division of this work.

In reducing the average of human life to a strict analysis, we shall be surprised to notice how great and varying an influence particular occupations, and a certain degree of density of population, have upon it, and upon the constitution and habits of individuals; and it must be readily admitted that beyond the mere interest of such details, inferences may be drawn of an inestimable kind, — to the philosopher who is ever ready to profit by them, — to the natural historian and physiologist, whose province it is to record them; and to the physician and general medical practitioner, who must at all times be desirous of adding to the store of that knowledge which must ever prove beneficial to their fellow-men. It is indeed by the aid of individual research, and a combination of their observations, that in all matters, whether in science, or in the field of the arts, manufactures, and commerce, sound and practical views are enunciated.

Whilst upon this interesting section of our subject, it may not be inappropriate to give a separate mention of the average duration of life enjoyed by persons of various professions and trades, as the same must be valuable to our readers in prompting the selection or rejection, for themselves or their children, of occupations favorable or injurious to health and longevity. At all events, if incompetent to determine or alter their particular path in life, according to their wishes, they may at least be able to ameliorate their position by strictly adhering to uniformly temperate and health-improving habits, so as not by their own imprudence to aggravate unavoidable evil, which is too generally the case with most of us who neglect to give due attention to so serious a concern.

We here quote the average periods, in years, of the Duration of Life which M. Lombard (an eminent French physician and physiologist) assigns to the undermentioned classes: — namely, Stone-cutter 34, Miller 42, Painter 44, Joiner 49, Butcher 53, Lawyer 51, Surgeon 54, Mason 55, Gardener 60, Merchant 62, Protestant Clergyman 63, Magistrate 69. And here it may be observed how prejudicially the three first-named trades appear to affect life, — very probably from their tendency to injure the chest and respiratory

organs; — how also the avocations of a lawyer and surgeon, from their frequently laborious and constant attention to business, tend to shorten life, as compared with the more healthful occupation of a gardener, and the less harassing duties of a merchant, divine, and magistrate. Of these 12 classes, collectively, the average of life appears to be 53 years.

We now select the ages of the more eminent of our poets, whose temperament, to a certain extent, may be said to be generally of a somewhat excitable character, but whose pursuits are of a purely intellectual order: — Shakspeare 52, Milton 63, Byron 37, Burns 37, Goethe 82, Collins 35, Gray 55, Scott 55, Ariosto 59, Tasso 59, Cowper 61. Here we see in the instance of Burns, Byron, and Collins, how powerfully their peculiarly unhappy circumstances acted upon their constitutions. The average life of these distinguished individuals was about 55½ years.

Of Statesmen: — Oliver Cromwell 59, Earl of Chatham 70, William Pitt 47, R. B. Sheridan 65, Canning 57, Walpole 71, C. J. Fox 60, Lord Liverpool 58, — average about 61 years.

Of Military Commanders: — Buonaparte 52, Alexander the Great 37, Bolivar 47, Marlborough 72, Prince Eugene 69, Blucher 77, — the average 59 years.

Of Philosophers: — Newton 80, Pascal 39, Sir Humphrey Davy 50, James Fergusson 66, — the average about 59 years.

And lastly, of Musicians, Sculptors, and Painters: — Handel 73, Jackson 74, Mozart 36, Haydn 78, Canova 65, Michael Angelo 72, Flaxman 71, Raphael 37, Sir T. Lawrence 61, Sir Joshua Reynolds 60, — the average about 63 years.

Excepting Mozart, who was naturally of a very delicate constitution, our great musicians lived to a good old age, and of which too we have had a recent instance in the late venerable Dr. Crotch. It is a remarkable fact, that Alexander the Great, Raphael, Byron, and Burns, all preëminently talented, but in many respects men of a similar disposition, died at the early age of *thirty-seven*. The connection between the mind and body is so intimate, that the one participates in a very high degree in the sympathizing influences of the other; and therefore the wear and tear of the mental and bodily faculties may be said to be simultaneous and co-equal. We therefore need not be surprised to trace its marked effects in the persons we have last mentioned, in whom there was a constant tumult of

ambitious and restless feelings, increased, too, by the ill effects of irregular and intemperate habits in the persons of Alexander, Byron, and Burns; and so painfully too, also, in the gifted but unhappy Collins; and if we recollect aright, the painter Barry died young, and was similarly affected.

The Proportion of Deaths to the Population in various countries is as follows: — Austria, 1 in 40; Belgium, 1 in 43; Denmark, 1 in 45; England, (on an average of four years, ending with 1849,) 1 in 46; France, 1 in 42; Norway and Sweden, 1 in 41; Portugal, 1 in 40; Prussia, 1 in 39; Russia in Europe, 1 in 44; Spain, 1 in 40; Switzerland, 1 in 40; Turkey, 1 in 39.

Reverting to the density of population, and its unfavorable influence on longevity, we may remark that, as an introductory step to the improvement of the sanitary condition of our large towns, it will have been observed how largely the professional skill of the architect, surveyor, and builder, has been latterly brought into requisition; more particularly in London, Manchester, and Liverpool, in clearing away masses of old and dilapidated houses, formerly occupied by the working classes; in widening thoroughfares, and covering the sites of the late ruinous tenements by ranges of buildings suited to the business purposes of rich mercantile firms, or the residence of wealthy individuals. This progress in the ornamental character of our street architecture we have watched, we must confess, with considerable anxiety, fully aware that unless ample and immediate provision were made elsewhere for the accommodation of the hundreds of working men, and their numerous families, thus driven from their abodes, (however wretched they might be,) greater evils must ensue than those which were attempted to be remedied, by the consequent and necessary influx of the population into districts already overloaded, and teeming with an accumulation of filth and disease of the worst possible character.

In the anxiety to promote increased splendor in the design and construction of houses in our chief cities and towns, we were much afraid that the equally important duty of consulting the social comforts and personal health of the poor man would be (but perhaps unintentionally) overlooked; — a result which must produce a vast amount of mischief in every quarter, wherever the all-desirable improvement of the sanitary condition of the laboring classes is neglected, and of course occurring in the most aggravated form in our

large commercial and manufacturing towns, where the industrious population is naturally concentrated. Our anticipations on this point, we are sorry to add, have been too substantially confirmed; and in proof thereof we annex a few statistical facts with relation to the increase of local population, arising from the cause we have already alluded to.

We find, from a very able communication, addressed by Horace Mann, Esq., to Dr. Guy, and published in the *Journal of the Statistical Society*, on the subject of the mortality prevailing in Church Lane, St. Giles's-in-the-Fields, London, during the last ten years — that the population, from the year 1841 to 1844, continued stationary at about 655, but in the three following years, to 1847, it increased to 1,095, the ratio being 67 per cent., and giving more than forty persons to each house, instead of twenty-four, as in 1841.

"The causes of this vast increase" (Mr. Mann observes) "appear to me attributable to two distinct facts, which would also determine the period of its commencement. First, the 'improvements' which were begun in the neighborhood in 1844; and, second, 'the Irish famines of 1846 and 1847.' The former of these causes would act in a very obvious way, and one which seems to raise a suspicion of the sanitary value of that kind of improvement which consists in occupying, with first or second-rate houses, ground previously covered by the tenements of the poorer classes. The expelled inhabitants cannot, of course, derive any advantage from the new erections, and are forced to invade the yet remaining hovels suited to their means; the circle of their habitations is contracted, while their numbers are increased; and thus a large population is crowded into a less space. The consequence may induce a doubt whether the improvement, in this manner, of the external appearance of districts, may not be the means of affecting prejudicially their general health. The latter of the above causes also, had, no doubt, considerable influence in producing the increase. Out of the 655 persons of all ages, who formed the population of Church Lane in 1841, 281, or about two-fifths, were natives of Ireland, and with their families constituted nearly the whole population. Of the great number of immigrants, who, during the late disastrous years in Ireland, flocked as well into the metropolis as into other large towns of England, there can be no doubt that the vast majority sought naturally the spots frequented by their countrymen; and Church Lane must have felt considerably the

effect of this accession. I shall not attempt to settle the comparative importance of these two causes in producing the increase, and only allude to them because they affect a subsequent calculation of mortality. From them, however, I think it may be assumed that any increase resulting from the improvements did not commence until 1845, and that any increase resulting from Irish immigration did not commence until the early part of 1847. During the seven years from January 1st, 1838, to December 31st, 1844, the population may be fairly supposed to remain nearly stationary at the numbers ascertained by the census of 1841."

In continuation of this interesting branch of inquiry, Dr. Guy states, from the Reports of the Registrar-General, that it appeared that the relative mortality in the town and country was as follows: Population to the square mile — country, 199; town, 5,100. Annual deaths in 1,000,000 — country, 19,300; town, 27,073; annual excess in town districts, 7,733. Rate of mortality — country, 1 in 52; town, 1 in 37. General mortality — England, 1 in 45; Isle of Wight, 1 in 58; Anglesea, 1 in 62; London, 1 in 39; Leeds, and Birmingham, 1 in 37; Sheffield, 1 in 33; Bristol, 1 in 32; Manchester (Union), 1 in 30; Liverpool (Parish), 1 in 29. Thus the inhabitants of London, compared with England at large, lose 8 years of their lives; of Liverpool, 19. The population of large towns in England being 4,000,000, the annual loss is between 331,000 and 332,000. But all towns are not necessarily so unhealthy, as appeared by the following statement: — Liverpool, deaths per 1,000, 35; Manchester, 32; Bath, Coventry, Derby, Dudley, Shrewsbury, and Sunderland, 26; Carlisle and Norwich, 25; Tynemouth, 23; Halifax and Kidderminster, 21.

Lord Ebrington, in his inquiries on the effect of high wages and good food, said — "That in the South-Western district, which includes Cornwall, Devon, Somerset, Dorset, and Wilts, it is only 1 in 52, or not 2 per cent.; while in that of the North-Western, including Cheshire and Lancashire, it is 1 in 37. Now, let it not be said that this is owing to extreme poverty, and want of necessaries of life; the actual condition of the laborers generally of the West, the badness of their dwellings, the lowness of their wages, the consequent scantiness of their food and clothing, have been the subjects of constant animadversion. With the exception of the Cornish miners, the condition of the laborers throughout the Western Counties is described

as nearly the same; yet in Wiltshire, the county of lowest wages, the deaths are 1 in 49; and Lancashire 1 in 36."

The average age at death in 1841, was, in Wiltshire, 35 years; in Lancashire, 22; at Liverpool, 17; that of the laborers in Wiltshire, 33; operatives in Liverpool, 15.

The following is a statement by Dr. Guy, of diseases which occasion the excessive mortality of large towns: — Deaths in 1,000,000 from smallpox — country, 500; town, 1,000; from measles — country, 350; town, 900; scarlet fever — country, 500; town, 1,000; typhus — country, 1,000; town, 1,250; epidemic and contagious disorders together — country, 2,400; town, 6,000. (Waste of life in towns under this head, 2,600 a year.) Diseases of infants: teething, convulsions, water in the head — country, 3,800; town, 4,600. Total excess of deaths, 5,500 in the 1,000,000. So that there was a waste of 22,000 lives in the 4,000,000 inhabiting large towns. The total number of deaths in 1841 was 343,847, or somewhat less than 1,000 a day. Now this is at the rate of 1 death in 46; but if there had been 1 in 50, or 2 per cent., no less than 25,407 lives would have been saved. Nor is it improbable such an improvement may be effected. If the sanitary condition of the entire country could be raised to the condition of the most healthy counties, so that instead of 1 death in 46, there should only be 1 in 54, an annual saving of no less than 49,349 lives, or about one seventh of the whole number of deaths, would accrue.

Dr. Playfair calculates that for every unnecessary death, there are 28 cases of unnecessary sickness; consequently in our large towns, there are above 700,000 cases of unnecessary sickness, and that the loss from unnecessary death and sickness for England and Wales is £11,000,000; and the United Kingdom £25,000,000. These were the items of expense which Dr. Playfair reckoned were incurred under the present system, or rather want of system, — direct attendance on the sick; loss of what they would have earned; premature death of productive contributors to the national wealth; and expense of premature funerals. Dr. Playfair estimated the loss for Manchester at nearly £1,000,000; Mr. Hawkesley, for Nottingham, at £300,000; Mr. Clay, for Preston, at £990,000; Mr. Coulthard, for Ashton-under-Lyne, at £235,000; and Dr. Playfair considered the loss of London to be above £2,500,000; and the total loss to England and Wales at little short of £11,000,000.

The mortality of the year 1846 greatly exceeded that of any former year. By the report of the Registrar-General for the quarter ending September, 1846, the deaths for the three previous months were 51,235; being an increase of 15,227 over those of the corresponding quarter of the preceding year. In some of the densely-populated towns, the mortality was doubled. The deaths in the corresponding summer quarters of the years 1845 and 1846, were as under: —

TOWNS.	1845.	1846.	TOWNS.	1845.	1846.
Maidstone.....	124	239	Clifton.....	323	436
Brighton.....	219	372	Worcester.....	106	173
Portsea Island.....	239	433	Dudley	457	744
Winchester.....	89	141	Walsall.....	158	288
Oxford	89	194	Wolverhampton ...	439	687
Northampton	182	221	Wolstanton and Burslem	164	315
Bedford.....	182	254	Coventry.....	188	300
Ipswich	119	240	Nottingham	285	469
Norwich	306	451	Lincoln	154	246
Plymouth	191	279			

The high mortality of towns has been traced to crowded lodgings, dirty dwellings, personal uncleanliness, the concentration of unhealthy emanations from narrow streets, without fresh air, water, or sewers. The rapidity of decomposition, and the facility with which all kinds of animal matter become tainted, and run into putrefaction, enable us to understand how, in a summer like the past, in which the temperature was unusually high, the diseases referable to impure atmosphere should be so prevalent and fatal.

These are a few of the many facts which so strongly prove the necessity of some great and comprehensive measure being taken to remedy this national evil. We may well apply the language of Holy Writ, "that in the midst of life we are in death." Any measure of such magnitude as this must naturally be attended with vast, but not insurmountable difficulties, all of which we cannot expect to be overcome by one enactment, or by one person. A cordial amalgamation of individual efforts, however, directed to the aid of government, will achieve immediate and permanent good.

On the first institution of Life Assurance in England, about the year 1700, the tables or rates of premiums adopted by the offices were exceedingly defective, — so much so, that reference in their

construction was made rather to the *value of money* than to the *value of life;* and that certain societies, such as the *Amicable* and *Royal Exchange,* appeared to have charged £5 per cent., *on all lives, without reference to the period of life, or to the constitutional condition of the assured, so that the young and healthy paid for the aged and infirm.* Since that time, however, a highly scientific and equitable system of Life Assurance has been adopted, in which proportionate rates are adopted for each age, and into which all the improvements suggested either by experience or advanced knowledge have been imparted.

We may, in conclusion, remark that various methods, but differing little in the general principles of their construction, are now adopted by the most eminent Actuaries in the formation of Tables of Mortality. All, however, appear to assent to the desirability, could it be attained, of establishing a more uniform practice amongst the Life Assurance Societies, in respect to THE BASIS OF THEIR CALCULATIONS, and the RATE OF INTEREST OF MONEY to be assumed in the tables of premium.

ON THE APPLICATION OF LIFE INSURANCE TO FORMING ENDOWMENTS, AND MAKING PROVISION FOR FAMILIES, AND FOR SECURITY OF DEBTS.

[From Ellis on Fire and Life Insurance, p. 164. See in connection, Chapter XII. of the preceding Treatise, § 275.]

1. *Where the Income terminates with Life.*
2. *Where the Income is to be transmitted to an Individual of a Family.*
3. *Where the Sum insured is to be paid to a Parent on a Child attaining a certain Age.*
4. *Where the Life of a Child is insured, to whom an Advance has been made.*
5. *Where the Creditor insures his Debtor's Life.*
6. *Insurance Money settled upon Marriage.*
7. *Insurance for the purpose of meeting Fines, &c. payable on the Dropping of a Life or Lives.*
8. *Insurance by way of Security on an Annuity Transaction.*

A FEW observations upon the practical uses of Life Insurance, with such remarks on the legal bearings of the subject as occur, may not be misplaced in a work of this nature.

1. The system of life insurance, if judiciously and prudently applied, is of invaluable use in enabling a parent to provide for a family, when his income principally depends upon his own life or exertions, as in the case of professional men, traders, annuitants, and persons holding places or pensions.

2. Where, although the income arising from property may be transmitted to one or more of his children after him, there may be danger that others of his children may be inadequately provided for, as in the case of a tenant for life, with remainder to the eldest son in fee or in tail, in which cases, although there is generally a provision for raising portions for younger children, yet frequently to an amount very inadequate to the support of the younger branches in those habits in which they have been brought up in common with the elder son; in such a case, a father, tenant for life, can, by a moderate

curtailment of his expenditure to a fixed limit within his income, make a much more ample provision in ordinary circumstances, than he would be likely to do, unless very diligently careful, by investing in the funds or other securities the same amount of savings from his income: and for this reason, that individuals in general in their savings operate by *simple* interest, whilst life insurance companies work by *compound*. Besides which advantage, by the practice of those offices where a division of profits is made, considerable additions are frequently made, by way of bonus, to the sum insured, to an extent which the insured never contemplated. The difference between individual saving and the working of an insurance office will appear by the following simple statement, and without taking the bonuses into calculation: supposing a man of thirty to save 200*l.* a year until he is sixty, which is sometimes more than he is entitled to expect, according to the ordinary calculations of human life, he will have accumulated only 6,000*l.*; but according to the average rate of premiums paid at most offices, a man of thirty can for about 2*l.* 10*s.* insure 100*l.*; and, therefore, by the payment of a premium of 200*l.* will at once entitle those whom he may select to receive 8,000*l.* even if he should die the next day after insuring; but if he should live to the average limits of human life, he will be entitled then to receive, not only that sum, but also an addition by way of bonus, which has been known to be more than equal to the sum insured. As before observed in a preceding chapter, where the proceeds of a policy of insurance, together with all sums of money, benefits and advantages to arise or accrue upon it, (*a*) are settled or given by will, the parties interested will take the proceeds, together with the proportionable share of bonus or accumulation.

3. A parent may insure a sum of money to be paid to himself in the event of a child (or one or more children) attaining twenty-one, or any given age at which it is probable that a sum of money may be requisite for the purpose of advancing the child in life. Here the objection sometimes made against life insurance is obviated, that the insured has not the satisfaction of reaping the benefit of his frugality himself, for by this operation he is enabled to see his family provided for in his lifetime.

(*a*) Courtney *v.* Ferrers, 1 Sim. 137.

4. So where a parent may have advanced any sum of money to a child, either by way of provision, or to establish him in any trade or business, he may properly treat such an advance as a debt, and secure himself from the loss which would arise by the premature death of the child, by insuring the child's life to the amount of the sum advanced.

5. The case of a creditor insuring his debtor's life is so obvious, and has been in a preceding chapter so far considered as to its legal bearing, that it is almost unnecessary to enter into it. (*b*) It may however, be observed, that where the debt depends alone upon the personal security of the debtor, as is generally the case when the creditor insures, it is the most effectual security the creditor can have under the circumstances; as he then depends not only upon the personal credit of the debtor, but he has also the benefit of his own care and caution; for if the debtor fail to pay the premiums, the creditor may, upon his failure, keep up the policy; and even if the debt be paid, he may still practically, although not legally, have the benefit of the policy, if he chooses to keep it on foot; for although by the statute, the interest of the creditor ceasing by payment of the debt, he cannot recover, yet as the officers never take the objection in a bonâ fide case, (*c*) he may still treat the policy as a valuable and salable security.

Where a party advances a loan of money to another upon the security only of an estate for the life of the borrower, at legal interest, there appears to be no objection to his compelling the borrower to insure his life, and pay the premiums, for the lender does not thereby "take directly or indirectly" more than legal interest; the borrower by insuring only secures the principal to the lender, in case of his death, the only security which he may have the means of giving. "Thus too," observes Blackstone, (*d*) "on a loan, if the chance of repayment depends on the borrower's life, it is frequent (besides the usual rate of interest) for the borrower to have his life insured till the time of repayment, for which he is loaded with an additional premium suited to his age and constitution. Thus if Sempronius has only an annuity for his life, and would borrow 100*l.* of Titius for a year; the inconvenience and general hazard of this loan, we have

(*b*) See § 275. (*c*) See ante, Barber *v.* Morris. (*d*) 3 Bla. Com. 459.

seen, are equivalent to 5*l.*, which is therefore the legal interest; but there is also a special hazard in this case, for if Sempronius dies within the year, Titius must lose the whole of his 100*l.* Suppose this chance to be as one to ten, it will follow that the extraordinary hazard is worth 10*l.* more, and therefore that the reasonable rate of interest in this case would be 15 per cent.; but this the law, to avoid abuses, will not permit to be taken: Sempronius therefore gives Titius, the lender, only 5*l.* for legal interest; but *applies to Caius, an insurer, and gives him the other* 10*l. to indemnify Titius against the extraordinary hazard.*

The principle upon which it has been held usury for the grantee of an annuity to compel the grantor to insure and pay the premiums is different. There the grantor pays annuity interest instead of legal interest; a contract, therefore, compelling him to keep up insurance at his own expense, would be in effect a contract to pay 10 or 15 per cent. for a loan of money, without any hazard of the principal. The principle of an annuity is, that the principal money is gone, the yearly payment of the annuity being the compensation for it.

6. It is not unusual for persons about to marry, amongst other modes of provision for a family, to covenant with the trustees to insure their lives to a certain extent: the objects and proportions in which the sum insured is to be distributed, at the death of the party, are pointed out by the trusts of the settlement. In such cases, however, it is the safer course that some property should be assigned to trustees to enable them to pay the premiums in case the insured should make default. It may be observed, on the other hand, that great care and consideration are requisite, before any person is induced, either from conscientious motives or the cupidity of others, to covenant with third persons to insure. In the case of marriage settlements, where trustees are interposed on the behalf of the married lady and her issue, as neither a married woman nor infants under age are capable of giving any legal consent, and trustees are bound by their duty to enforce the performance of the covenants, not only in behalf of the lady, but the issue which may be born; they have no power to modify or adopt the amount of insurance to the circumstances of the parties, after the covenants are once entered into, and the marriage has taken effect. A person then who has been unadvisedly induced to covenant to insure to a large amount, may find that

in the contingencies of life, he has no longer the disposable income he contemplated, and therefore may be utterly unable to keep up his insurance, whilst at the same time the trustees, from the danger of future responsibility to the parties interested in the settlement, are driven unwillingly to the necessity of attempting to enforce the contract, an attempt which cannot fail to be productive of great inconvenience, or ruin, to the party insured, as well as to the family prospectively provided for. A case has occurred in the author's experience, showing how very harshly this mode of settlement might operate to the parties more immediately interested, if improvidently entered into, that is to say, unless a party covenants to insure for such an amount, and such only as he has a moral certainty, after making every allowance for the ordinary expenditure of a family, and the possible decrease of his income, that he can conveniently provide the premiums. A gentleman, upon his marriage with a lady of considerable fortune, in consideration of that fortune, &c., covenanted with the trustees to insure his life for 20,000*l.*; the interest thereof at his death to be paid to the lady for life, and after her death the principal to be paid to the children, subject to a power of appointment, and he also conveyed certain real estates to the trustees of larger annual value than the premiums amounted to, in trust to pay the premiums out of the rents and profits in case he should make default. In course of time, he became embarrassed in his circumstances, and the trustees found it necessary to enter upon the estates for the purpose of paying the premiums; the rents and profits of these estates, in the mean time, had become so reduced as to be barely sufficient to pay them. The husband lived apart from his wife, and there were no children of the marriage; neither husband or wife had any property remaining but the trifling surplus of the rents and profits of the real estate, after payment of the premiums of insurance. The husband had also by the settlement covenanted with the trustees to allow his wife an annuity by way of pin money, with which the estates conveyed were also charged, and there was no appearance upon the deed that the keeping up of the insurance was of primary obligation. Upon a bill filed for the administration of the trusts, the Vice-Chancellor, willing to relieve where opportunity offered, made a declaration that the keeping up the insurance, and the payment of the annuity, was of equal obligation upon the trustees, and referred it to the Master to inquire and state which of the policies of insurance, and to what

amount, ought to be cancelled or disposed of, and ordered that so much of the rents and profits as were not necessary for keeping up the rest of the policies, should be paid to the wife on account of the annuity. If, however, this annuity had not been settled, the trustees would have had no alternative but to keep up the insurances for the benefit of children not in existence, and of the wife, who was thus placed in the unnatural situation of being compelled to look to the death of her husband, as the only means of extricating her from poverty. (*a*) Nor is it easy to see how any jurisdiction, short of that of parliament, could have relieved the trustees from their duty, if it had been imposed upon them by the trusts of the settlement.

7. In all cases where a fine, foregift, or other pecuniary advance has been made upon a lease determinable upon a life or lives, insurance upon the life, or the survivor of the lives, where more than one, is usually applied; so if a fine is payable upon the renewal of a lease granted for a life, or two or more lives, an insurance for the purpose of covering the fine when payable is desirable, and is a convenient form of spreading over a larger surface a sum which might be with difficulty raised at once, and at some unexpected point of time. It appears also essentially necessary, where a tenant for life is desirous of raising money upon mortgage of his life-interest; as without it, the lender may the next day be deprived of his security, although the more usual practice in such cases is to raise the sum by annuity, and make the life-estate a security.

8. When money is raised by the grant of an annuity, there is in general a stipulation in the deed that the grantor shall appear at some insurance office to be insured; as before observed, if the grantor were compelled to stipulate to pay the premiums, the whole transaction might be endangered on the ground of usury; for thus the principal would no longer be hazarded, at the same time that annuity interest, instead of legal interest, would be payable; but the grantee in general virtually imposes upon the grantor the burden of insurance by purchasing his annuity at such a rate as compensates for the payment of the premiums of insurance by himself. From the peculiar nature of annuity transactions, there is no contract, with reference to which insurance becomes so necessary; because in general, few will

(*a*) F—— *v.* W——, June, 1830, Vice-Chan. MS.

resort to borrowing money upon annuity who have any security to offer, by which to raise money at the usual and legal rates of interest. Annuities, from their nature, are exempt from the statutes respecting usury, because in these transactions, not only the interest, but the principal also is by the terms of the contract (*a*) in hazard. If the principalbe secured by the terms of the contract, without reference to the possible insolvency of the borrower, any device to receive more than legal interest will be usurious. (*b*) Interest has been considered as a premium upon the *forbearance* to sue for the debt, and our idea of usury in this country is founded upon that principle. (*c*) Although an annuity may be purchased for a very inadequate price, yet the transaction does not appear to be illegal, unless there be fraud, oppression, undue influence, or other circumstances which might induce a court of equity to interfere. It was found, from the circumstance, that few, but very necessitous persons, would resort to a mode of raising money, in which there was no restriction as to terms but the conscience of the lender, and where, on the other hand, from the situation of the borrower, not very many were disposed to lend but the speculative or unprincipled, that great frauds had been practised. These frauds were the more gross and exorbitant, because both parties were usually desirous that the transaction should be secret. The credit of the borrower and the character of the lender might equally suffer by notoriety. The legislature therefore were compelled at length to interfere, not by putting a direct check upon the practice, but with the view, by rendering publicity necessary, indirectly to put an end to it. It has now been rendered necessary that a memorial of the particulars of all such transactions, together with the names of all parties, should be enrolled in Chancery.

(*a*) Nurse *v.* Wilson, 5 T. R. 353.
(*b*) See Chesterfield *v.* Janssen, 1 Atk. 340; 2 Ves. 142.
(*c*) Nurse *v.* Wilson, 3 T. R. 353.

LIFE TABLES,

According to the late Census of the United States, Massachusetts being taken as a standard for the Northern States, and Maryland for the Middle States.

1. ANNUAL DEATHS PER CENT, 1850.

Ages.	Massachusetts.		Maryland.		England, 1841.	
	Males.	Females.	Males.	Females.	Males.	Females.
0 to 5	7.105	6.052	5.466	4.875	5.888	5.880
5 10	1.168	983	1.041	855	955	922
10 15	452	573	477	606	509	545
15 20	872	831	605	757	718	801
20 30	998	1.170	896	938	949	942
30 40	1.253	1.346	991	1.146	1.080	1.121
40 50	1.513	1.325	1.884	1.249	1.410	1.308
50 60	2.067	1.654	2.433	1.712	2.230	1.938
60 70	3.482	2.960	3.405	3.285	4.232	3.761
70 80	6.767	5.762	8.977	7.221	9.150	8.378
80 90	15.000	13.470	15.157	12.280	19.085	18.085
90 100	35.240	27.540	31.132	23.430	37.039	34.057

2. EXPECTATION OF LIFE.

Completed Age.	Massachusetts.		Maryland.		England.		France.	
	Males. Yrs.	Females. Yrs.	Males. Yrs.	Females. Yrs.	Males. Yrs.	Females. Yrs.	Males. Yrs.	Females. Yrs.
0.....	38.3	40.5	41.8	44.9	40.2	42.2	38.3	40.8
10.....	48.0	47.2	47.3	49.5	47.1	47.8	47.0	47.4
20.....	40.1	40.2	39.7	42.1	39.9	40.8	40.0	40.1
30.....	34.0	35.4	32.9	35.7	33.1	34.3	34.0	33.4
40.....	27.9	27.8	25.8	29.5	26.6	27.7	27.0	26.6
50.....	21.6	23.5	20.2	22.7	20.0	21.1	19.9	19.6
60.....	15.6	17.0	14.4	16.0	13.6	14.4	13.3	13.2
70.....	10.2	11.8	9.1	10.5	8.5	9.0	8.1	8.1
80.....	5.9	6.4	6.2	7.0	4.9	5.2	4.8	4.8
90.....	2.8	3.0	3.9	4.3	2.7	2.8	3.2	3.2

3. EXPECTATION OF LIFE FOR COLORED PERSONS.

Completed Age.	New England.		Maryland.		Louisiana.	
	Colored.		Slaves.		Colored.	
	Males.	Females.	Males.	Females.	Males.	Females.
0.....	39.75	42.20	38.47	39.47	28.89	34.09
10.....	42.92	45.75	45.30	41.00	35.92	40.69
20.....	35.87	39.92	39.28	39.63	30.48	35.36
30.....	29.77	34.96	34.41	35.62	26.87	30.86
40.....	22.83	28.75	27.50	29.00	23.25	25.85
50.....	18.27	22.11	21.16	23.17	19.13	21.07
60.....	13.89	17.31	14.32	16.71	14.75	15.27
70.....	9.42	13.06	8.76	10.57	11.33	10.93
80.....	6.44	7.87	5.40	6.80	5.38	6.16
90.....	3.60	4.61	3.80	4.00	3.43	3.34

RATIO OF MORTALITY,

For general estimates, adopting the current classification of the States, the American Census exhibits the following ratios of mortality, disregarding the ages at death:

	Annual deaths per cent.	Ratio to the number living.
New England States,	1.55	1 to 64
Middle States with Ohio,	1.39	1 to 72
Central Slave States,	1.38	1 to 73
Coast Planting States,	1.37	1 to 73
Northwestern States,	1.24	1 to 80
United States, total,	1.38	1 to 73

RATES OF PREMIUM OF THE GRESHAM LIFE ASSURANCE SOCIETY OF LONDON.

[This Society has an extensive range of business.]

TABLE A. WHOLE LIFE. WITHOUT PROFITS.

PREMIUMS FOR THE ASSURANCE OF £100.

Age next Birth-Day.	Annual Premium.			Half Yearly Premium.			Quarterly Premium.		
	£	s.	d.	£	s.	d.	£	s.	d.
21	1	14	7	0	17	9	0	9	1
22	1	15	4	0	18	1	0	9	3
23	1	16	2	0	18	6	0	9	6
24	1	17	0	0	19	0	0	9	9
25	1	17	11	0	19	3	0	9	11
26	1	18	10	0	19	11	0	10	2
27	1	19	7	1	0	4	0	10	5
28	2	0	10	1	0	11	0	10	9
29	2	1	10	1	1	5	0	11	0
30	2	2	11	1	2	0	0	11	3
31	2	4	1	1	2	7	0	11	7
32	2	5	3	1	3	3	0	11	11
33	2	6	7	1	3	11	0	12	3
34	2	7	11	1	4	7	0	12	7
35	2	9	4	1	5	3	0	12	11
36	2	10	10	1	6	0	0	13	4
37	2	12	4	1	6	10	0	13	9
38	2	14	0	1	7	4	0	14	2
39	2	15	9	1	8	7	0	14	8
40	2	17	7	1	9	6	0	15	1
41	2	19	7	1	10	6	0	15	8
42	3	1	8	1	11	7	0	16	2
43	3	3	11	1	12	9	0	16	9
44	3	6	3	1	13	11	0	17	5
45	3	8	9	1	15	3	0	18	0
46	3	11	4	1	16	7	0	18	9
47	3	14	1	1	18	0	0	19	6
48	3	17	0	1	19	6	1	0	3
49	4	0	2	2	1	3	1	1	0
50	4	2	5	2	2	9	1	1	11

TABLE B. WHOLE LIFE. WITH PROFITS.

PREMIUMS FOR THE ASSURANCE OF £100.

Age next Birth-Day.	Annual Premium.			Half Yearly Premium.			Quarterly Premium.		
	£	s.	d.	£	s.	d.	£	s.	d.
21	1	19	5	1	0	2	0	10	4
22	2	0	3	1	0	8	0	10	7
23	2	1	1	1	1	1	0	10	10
24	2	2	0	1	1	6	0	11	0
25	2	2	11	1	2	0	0	11	3
26	2	3	11	1	2	6	0	11	6
27	2	4	11	1	3	0	0	11	10
28	2	6	0	1	3	7	0	12	1
29	2	7	1	1	4	1	0	12	4
30	2	8	3	1	4	2	0	12	8
31	2	9	5	1	5	4	0	13	0
32	1	10	8	1	6	0	0	13	4
33	2	12	0	1	6	8	0	13	8
34	2	13	5	1	7	5	0	14	0
35	2	14	11	1	8	2	0	14	5
36	2	16	6	1	9	0	0	14	10
37	2	18	2	1	9	10	0	15	3
38	2	19	11	1	10	9	0	15	9
39	3	1	9	1	11	8	0	16	3
40	3	3	8	1	12	8	0	16	9
41	3	5	9	1	13	8	0	17	3
42	3	7	11	1	14	10	0	17	10
43	3	10	3	1	16	0	0	18	5
44	3	12	9	1	17	3	0	19	1
45	3	15	4	1	18	3	0	19	10
46	3	18	1	2	0	1	1	0	6
47	4	1	1	2	1	7	1	1	3
48	4	4	2	2	3	1	1	2	1
49	4	7	5	2	4	9	1	2	11
50	4	10	11	2	6	7	1	3	11

TABLE C.

SHORT PERIODS.

WITHOUT PROFITS.

PREMIUMS FOR THE ASSURANCE OF £100.

Age	One Year.			Seven Years.		
	£	s.	d.	£	s.	d.
21	0	17	9	0	19	9
22	0	18	0	1	0	0
23	0	18	4	1	0	4
24	0	18	8	1	0	8
25	0	19	0	1	1	0
26	0	19	4	1	1	4
27	0	19	9	1	1	9
28	1	0	2	1	2	2
29	1	0	7	1	2	7
30	1	1	0	1	3	0
31	1	1	6	1	3	6
32	1	1	11	1	3	11
33	1	2	5	1	4	5
34	1	2	11	1	4	11
35	1	3	6	1	5	6
36	1	4	1	1	6	1
37	1	4	9	1	6	9
38	1	5	6	1	7	6
39	1	6	4	1	8	4
40	1	7	3	1	9	3
41	1	8	5	1	10	5
42	1	9	9	1	11	9
43	1	11	3	1	13	3
44	1	12	11	1	14	11
45	1	14	10	1	16	10
46	1	16	11	1	18	11
47	1	19	2	2	1	2
48	2	1	8	2	3	8
49	2	4	4	2	6	4
50	2	7	3	2	9	3

TABLE D. WITH PROFITS.

ANNUAL PREMIUMS FOR THE ASSURANCE OF £100, TO BE RECEIVED AT 50, 55, 60, AND 65 YEARS OF AGE, OR EARLIER IN CASE OF DEATH.

Age next Birth-Day.	50			55			60			65		
	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.
16	2	16	7	2	10	7	2	6	5	2	3	6
17	2	18	2	2	11	10	2	7	5	2	4	4
18	2	19	11	2	13	2	2	8	5	2	5	2
19	3	1	10	2	14	7	2	9	6	2	6	1
20	3	3	10	2	16	0	2	10	8	2	7	0
21	3	6	0	2	17	7	2	11	11	2	8	0
22	3	8	4	2	19	3	2	13	2	2	9	1
23	3	10	10	3	1	1	2	14	7	2	10	2
24	3	13	6	3	3	0	2	16	0	2	11	4
25	3	16	5	3	5	0	2	17	6	2	12	7
26	3	19	7	3	7	3	2	19	2	2	13	10
27	4	3	1	3	9	7	3	0	11	2	15	2
28	4	6	11	3	12	1	3	2	9	2	16	8
29	4	11	0	3	14	11	3	4	9	2	18	2
30	4	15	8	3	17	10	3	6	10	2	19	10
31	5	0	9	4	1	1	3	9	1	3	1	6
32	5	6	5	4	4	7	3	11	6	3	3	4
33	5	12	9	4	8	5	3	14	2	3	5	4
34	5	19	10	4	12	8	3	17	0	3	7	5
35	6	7	11	4	17	4	4	0	0	3	9	8
36	6	17	3	5	2	5	4	3	4	3	12	0
37	7	8	0	5	8	2	4	7	0	3	14	7
38	8	0	5	5	14	7	4	10	11	3	17	4
39	8	15	3	6	1	10	4	15	3	4	0	4
40	9	13	0	6	10	0	5	0	1	4	3	7
41	.	..	..	6	19	5	5	5	4	4	7	1
42	.	..	..	7	10	3	5	11	3	4	11	0
43	.	..	..	8	2	11	5	17	11	4	15	2
44		..	..	8	17	11	6	5	4	4	19	10
45	.	..	..	9	15	10	6	13	9	5	4	10
46	.	..	..	.	..	..	7	3	5	5	10	6
47	.	..	..	.	..	..	7	14	6	5	16	8
48		..	..	.	..	..	8	7	4	6	3	7
49		..	..	.	..	..	9	2	6	6	11	3
50	.	..	..	.	..	..	10	0	8	7	10	0
51	.	..	..	.	..	..	..	..	..	7	9	10
52	.	..	..	.	..	..	..	..	..	8	1	2
53	.	..	..	.	..	..	..	..	..	8	14	3
54	.	..	..	.	..	..	..	..	..	9	9	9
55	.	..	..	.	..	..	..	..	..	10	8	1

TABLE M.

Premiums for the Assurance of an Endowment of £100, payable to Children on attaining the Ages of Fourteen or Twenty-one Years.

Age.	AT FOURTEEN YEARS. Annual.			Half-Yearly.			Quarterly.			AT TWENTY-ONE YEARS. Annual.			Half-Yearly.			Quarterly.		
	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.
At Birth.	4	13	2	2	7	2	1	3	11	2	12	4	1	6	6	0	13	5
Yr. 1	5	6	0	2	13	8	1	7	2	2	17	10	1	9	3	0	14	11
2	5	19	6	3	0	6	1	10	8	3	3	1	1	12	0	0	16	3
3	6	15	2	3	8	5	1	14	8	3	8	11	1	14	11	0	17	8
4	7	13	6	3	17	9	1	19	5	3	15	2	1	18	1	0	19	4
5	8	14	7	4	8	5	2	4	9	4	2	1	2	1	7	1	1	1
6	10	2	5	5	2	10	2	12	1	4	9	11	2	5	7	1	3	1
7	11	18	11	6	1	0	3	1	3	4	19	3	2	10	4	1	5	6
8	14	6	7	7	5	2	3	13	6	5	8	2	2	14	9	1	7	9
9	17	9	1	8	16	9	4	9	6	6	1	10	3	1	8	1	11	3
10	.	.	.	.	.	.	.	.	.	6	16	7	3	9	3	1	15	1
11	.	.	.	.	.	.	.	.	.	7	13	6	3	17	9	1	19	5
12	.	.	.	.	.	.	.	.	.	8	14	9	4	8	7	2	4	10
13	.	.	.	.	.	.	.	.	.	10	1	5	5	2	0	2	11	8
14	.	.	.	.	.	.	.	.	.	11	15	11	5	19	6	3	0	6
15	.	.	.	.	.	.	.	.	.	14	2	7	7	3	2	3	12	5
16	.	.	.	.	.	.	.	.	.	17	6	8	8	15	4	4	8	9

TABLE N.

Premiums for the Assurance of an Endowment of £100, payable to Children on attaining the age of Fourteen or Twenty-one Years, the Premiums being returnable in case of previous death; with the option also of transferring the endowment to another Child.

Age.	AT FOURTEEN YEARS. Annual.			Half-Yearly.			Quarterly.			AT TWENTY-ONE YEARS. Annual.			Half-Yearly.			Quarterly.		
	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.
At Birth.	5	10	11	2	16	3	1	8	6	3	2	2	1	11	5	0	16	0
1	6	2	5	3	2	4	1	11	6	3	6	11	1	13	11	0	17	2
2	6	15	10	3	8	10	1	14	10	3	12	3	1	16	8	0	18	6
3	7	11	9	3	16	11	1	18	11	3	18	2	1	19	7	1	0	1
4	8	10	11	4	6	7	2	3	10	4	4	11	2	3	1	1	1	10
5	9	14	5	4	18	7	2	9	11	4	12	5	2	6	10	1	3	10
6	11	3	11	5	13	5	2	17	5	5	1	1	2	11	3	1	6	0
7	13	1	11	6	12	8	3	7	2	5	10	11	2	16	3	1	8	6
8	15	12	8	7	18	4	4	0	1	6	2	5	3	2	4	1	11	6
9	19	3	11	9	14	5	4	18	5	6	15	10	3	8	10	1	14	0
10	.	.	.	.	.	.	.	.	.	7	11	9	3	16	11	1	18	11
11	.	.	.	.	.	.	.	.	.	8	10	11	4	6	7	2	3	10
12	.	.	.	.	.	.	.	.	.	9	14	5	4	18	7	2	9	11
13	.	.	.	.	.	.	.	.	.	11	3	11	5	13	5	2	17	5
14	.	.	.	.	.	.	.	.	.	13	1	11	6	12	8	3	7	2
15	.	.	.	.	.	.	.	.	.	15	12	8	7	18	4	4	0	1
16	.	.	.	.	.	.	.	.	.	19	3	11	9	14	5	4	18	5

TABLE H.

DEFERRED ANNUITIES.

Annual Premium to assure an Annuity of £10 per annum on attaining the ages of 50, 55, 60, and 65.

Age next Birth Day.	50			55			60			65		
	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.
15	1	15	7	1	3	0	0	14	3	0	8	2
20	2	6	6	1	9	7	0	18	1	0	10	4
25	3	2	5	1	18	9	1	3	3	0	13	2
30	4	7	2	2	12	2	1	10	8	0	17	0
35	6	9	9	3	13	2	2	1	6	1	2	7
40	.	.	.	5	9	5	2	18	6	1	10	10
45	.	.	.	.	.	.	4	8	3	2	3	11

TABLE I.

DEFERRED ANNUITIES.

With return of Premiums.

Age next Birth Day.	50			55			60			65		
	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.
15	2	1	2	1	7	7	0	18	0	0	10	10
20	2	13	3	1	15	2	1	2	6	0	13	8
25	3	10	7	2	5	7	1	8	11	0	17	5
30	4	17	0	3	0	8	1	17	8	1	2	7
35	7	1	9	4	3	8	2	10	5	1	9	9
40	.	.	.	6	2	7	3	10	0	2	0	1
45	.	.	.	.	.	.	5	3	0	2	16	2

TABLE K.

IMMEDIATE ANNUITIES.

Showing the amount of Annuity granted for every £100 paid down.

Age last Birth Day.	Yearly.			Half-Yearly			Quarterly.		
	£	s.	d.	£	s.	d.	£	s.	d.
20	4	19	10	2	9	4	1	4	6
25	5	4	0	2	11	4	1	5	7
30	5	9	2	2	13	10	1	6	9
35	5	15	10	2	17	1	1	8	4
40	6	4	6	3	1	4	1	10	5
45	6	16	5	3	7	1	1	13	4
50	7	12	5	3	14	10	1	17	1

TABLE J.

SURVIVORSHIP ANNUITIES.

Annual Premium to secure to A an Annuity of £10 for Life, after Death of B.

Age of A.	Age of B.	Annual Premium.		
		£	s.	d.
15	15	2	3	3
20	20	2	4	10
25	25	2	6	11
30	30	2	9	5
35	35	2	12	8
40	40	2	16	11
45	45	3	3	0

RATES OF PREMIUM OF THE MUTUAL LIFE INSURANCE COMPANY, OF NEW YORK.

[Net accumulated cash fund, November 15, 1853, $2,337,426.]

NON-PARTICIPATING TERM TABLE.

The Annual Rates of Assurance of One Thousand Dollars on a Single Life, for a term of years, without participation in profits:

Age.	On a policy for 7 years.	On a Policy for 5 years.	On a Policy for 2 years.	On a Policy for 1 year.	Age.
14	7 18	6 99	6 70	6 60	14
15	7 39	7 20	6 90	6 80	15
16	7 61	7 41	7 11	7 00	16
17	7 83	7 62	7 31	7 21	17
18	8 05	7 84	7 53	7 42	18
19	8 28	8 07	7 74	7 63	19
20	8 52	8 30	7 97	7 85	20
21	8 77	8 54	8 20	8 08	21
22	9 02	8 78	8 44	8 32	22
23	9 27	9 03	8 68	8 56	23
24	9 54	9 29	8 92	8 80	24
25	9 81	9 55	9 17	9 05	25
26	10 09	9 83	9 43	9 30	26
27	10 39	10 11	9 70	9 57	27
28	10 69	10 40	9 98	9 84	28
29	11 00	10 71	10 28	10 13	29
30	11 32	11 02	10 57	10 43	30
31	11 66	11 34	10 88	10 72	31
32	12 00	11 68	11 20	11 05	32
33	12 36	12 02	11 53	11 37	33
34	12 73	12 38	11 87	11 70	34
35	13 11	12 75	12 22	12 05	35
36	13 51	13 13	12 58	12 40	36
37	13 93	13 54	12 96	12 77	37
38	14 37	13 96	13 35	13 16	38
39	14 84	14 40	13 76	13 56	39
40	15 33	14 86	14 19	13 98	40
41	15 87	15 35	14 65	14 42	41
42	16 46	15 88	15 12	14 89	42
43	17 10	16 45	15 63	15 37	43
44	17 81	17 10	16 17	15 90	44
45	18 59	17 81	16 75	16 45	45
46	19 44	18 60	17 43	17 07	46
47	20 38	19 48	18 21	17 81	47
48	21 38	20 42	19 06	18 62	48
49	22 46	21 44	19 98	19 51	49
50	23 62	22 52	20 97	20 47	50
51	24 87	23 68	22 02	21 50	51
52	26 22	24 92	23 14	22 57	52
53	27 69	26 28	24 34	23 75	53
54	29 29	27 74	25 63	24 98	54
55	31 06	29 35	27 04	26 33	55
56	33 00	31 12	28 58	27 79	56

LIFE TABLE.

The Rates of Assurance of One Thousand Dollars on a single life, for the whole continuance thereof:—

Age.	Quarterly Payments for Life.	Semi-An. Payments for Life.	Annual Payments for Life.	Annual Payments for 10 Yrs	Annual Payments for 5 Y'rs.	In One Payment.	Age.
14	3 77	7 48	14 71	33 49	57 68	254 59	14
15	3 88	7 68	15 11	34 18	58 86	259 69	15
16	3 98	7 89	15 52	34 89	60 05	264 88	16
17	4 09	8 11	15 94	35 62	61 27	270 16	17
18	4 20	8 33	16 38	36 35	62 51	275 53	18
19	4 32	8 56	16 83	37 11	63 78	280 99	19
20	4 44	8 80	17 30	37 87	65 07	286 56	20
21	4 56	9 05	17 78	38 66	66 38	292 23	21
22	4 69	9 30	18 28	39 45	67 72	298 00	22
23	4 82	9 56	18 80	40 27	69 08	303 88	23
24	4 96	9 84	19 34	41 10	70 48	309 87	24
25	5 10	10 12	19 89	41 95	71 89	315 97	25
26	5 25	10 41	20 47	42 82	73 35	322 20	26
27	5 41	10 72	21 07	43 71	74 83	328 55	27
28	5 57	11 04	21 70	44 62	76 34	335 03	28
29	5 73	11 37	22 35	45 55	77 88	341 64	29
30	5 91	11 71	23 02	46 51	79 46	348 38	30
31	6 09	12 07	23 73	47 48	81 07	355 26	31
32	6 28	12 45	24 47	48 48	82 72	362 29	32
33	6 47	12 84	25 23	49 50	84 41	369 46	33
34	6 68	13 24	26 03	50 55	86 13	376 78	34
35	6 89	13 67	26 87	51 62	87 89	384 26	35
36	7 12	14 12	27 75	52 72	89 70	391 90	36
37	7 36	14 59	28 67	53 86	91 55	399 71	37
38	7 61	15 08	29 64	55 02	93 44	407 70	38
39	7 87	15 60	30 66	56 21	95 38	415 87	39
40	8 14	16 14	31 73	57 45	97 37	424 23	40
41	8 43	16 72	32 86	58 72	99 41	432 79	41
42	8 74	17 32	34 05	60 03	101 51	441 54	42
43	9 06	17 96	35 30	61 38	103 66	450 49	43
44	9 40	18 64	36 63	62 78	105 87	459 66	44
45	9 76	19 35	38 04	64 24	108 15	469 03	45
46	10 14	20 11	39 53	65 74	110 49	478 62	46
47	10 55	20 92	41 11	67 31	112 91	488 41	47
48	10 98	21 77	42 78	68 92	115 39	498 37	48
49	11 43	22 66	44 55	70 59	117 92	508 49	49
50	11 91	23 61	46 42	72 31	120 51	518 75	50
51	12 42	24 62	48 39	74 08	123 15	529 15	51
52	12 95	25 69	50 49	75 91	125 85	539 68	52
53	13 52	26 82	52 71	77 81	128 61	550 36	53
54	14 13	28 02	55 07	79 78	131 44	561 17	54
55	14 77	29 29	57 58	81 84	134 34	572 12	55
56	15 46	30 65	60 25	83 98	137 32	583 19	56

ENDOWMENT ASSURANCE TABLE.

Annual Premium for an Assurance of One Thousand Dollars, payable to the Party assured, on his attaining the age of 50, 55, *or* 60; *or to his representatives, in case of death before attaining these ages, respectively.*

Age.	50	55	60	Age.	50	55	60
14	21 13	18 69	17 04	33	53 98	41 35	34 15
15	21 97	19 35	17 59	34	57 71	43 68	35 73
16	22 85	20 04	18 16	35	62 32	46 24	37 44
17	23 79	20 77	18 76	36	67 39	49 06	39 28
18	24 78	21 53	19 39	37	73 25	52 21	41 28
19	25 85	22 34	20 04	38	80 08	55 72	43 47
20	26 98	23 20	20 73	39	88 16	59 67	45 86
21	28 19	24 10	21 45	40	97 87	64 15	48 49
22	29 49	25 06	22 20	41	.. ..	69 27	51 39
23	30 89	26 08	23 00	42	.. ..	75 18	54 62
24	32 39	27 17	23 84	43	.. ..	82 07	58 22
25	34 02	28 32	24 73	44	.. ..	90 22	62 27
26	35 78	29 56	25 67	45	.. ..	100 00	66 86
27	37 70	30 88	26 66	46	.. ..	.. ..	72 10
28	39 79	32 31	27 72	47	.. ..	.. ..	78 13
29	42 08	33 84	28 84	48	.. ..	.. ..	85 15
30	44 61	35 49	30 04	49	.. ..	.. ..	93 43
31	47 40	37 28	31 32	50	.. ..	.. ..	103 32
32	50 51	39 23	32 69	51	.. ..	.. ..	115 36

DEPOSIT TABLE.

The amount of Assurance which One Hundred Dollars, paid to the Company, without any further payment, will purchase.

Age when Deposited.	Sum Assured.	Age when Deposited.	Sum Assured.	Age when Deposited.	Sum Assured.
14	392 80	28	298 48	42	226 48
15	385 08	29	292 70	43	221 98
16	377 53	30	287 04	44	217 55
17	370 16	31	281 48	45	213 20
18	362 94	32	276 02	46	208 93
19	355 88	33	270 67	47	204 74
20	348 97	34	265 41	48	200 65
21	342 19	35	260 24	49	196 66
22	335 57	36	255 17	50	192 77
23	329 08	37	250 18	51	188 98
24	322 72	38	245 28	52	185 29
25	316 48	39	240 46	53	181 70
26	310 36	40	235 72	54	178 20
27	304 36	41	231 06	55	174 79

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